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Judge Advocate General's Department

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Holdings, Opinions and Reviews

Volume 51

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CM 276703 - CM 278598

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WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGQ - CM 276703

UNITED STATES	)	FIRST AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at Westover Field, Massachusetts, 20 February 1945. Dismissal, total forfeitures and confinement for three (3) years.
	)	
First Lieutenant HERBERT L. McNEELY (0-363428), Air Corps.	)	

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OPINION of the BOARD OF REVIEW
ANDREWS, FREDERICK and BIERER, Judge Advocates

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1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 93rd Article of War.

Specification 1: In that Herbert L. McNeely, 1st Lt., Air Corps, Section D, 112th AAF Base Unit (Bombardment (H)), Army Air Base, Westover Field, Massachusetts, did, at Hartford, Connecticut, on or about 8 August 1944, with intent to do her bodily harm, commit an assault upon Grace B. McNeely by threatening her with a dangerous weapon, to wit, a loaded pistol.

Specification 2: In that Herbert L. McNeely, 1st Lt., Air Corps, Section D, 112th AAF Base Unit (Bombardment (H)), Army Air Base, Westover Field, Massachusetts, did, at Hartford, Connecticut, on or about 8 August 1944, with intent to do her bodily harm, commit an assault upon Grace B. McNeely, by choking her about the neck and throat with his hands.

Specification 3: (Finding of not guilty.)

CHARGE II: Violation of the 96th Article of War.

Specification: In that Herbert L. McNeely, 1st Lt., Air Corps, Section D, 112th AAF Base Unit (Bombardment (H)), Army Air Base, Westover Field, Massachusetts, did, at Springfield, Massachusetts, on or about 8 August 1944, unlawfully carry a concealed weapon, viz a pistol.

ADDITIONAL CHARGE: Violation of the 94th Article of War.

Specifications 1 and 2: (Pleas of the Statute of Limitations sustained.)

Specification 3: In that First Lieutenant Herbert L. McNeely, D Squadron, 112th Army Air Forces Base Unit (CCTS (H)), did, at Keesler Field, Mississippi, on or about 28 February 1942, make a claim against the United States by presenting to Lieutenant Colonel R. K. LeBrou, Finance Department, an officer of the United States, duly authorized to pay such claim, a pay and allowance account voucher in the amount of $183.90, for pay and allowances for the period 1 February 1942 to 28 February 1942, which claim was false and fraudulent in that notation of Class E allotment in the amount of $100.00 was omitted from said voucher and was then known by said First Lieutenant Herbert L. McNeely to be false and fraudulent.

Specifications 4-21: These Specifications are identical with Specification 3, except as to the places, times of making, periods of time covered by, and the amounts of the claims, and the names of the Finance Officers to whom presented, which exceptions are, respectively, as follows:

Specification	Place	a. Date of making. b. Period of time covered.	Amount	Name of Finance Officer
4		a. 31 March 1942 b. 1 March 1942 to 31 March 1942	$185.70	
5		a. 30 April 1942 b. 1 April 1942 to 30 April 1942	$185.10	1st Lt. G.B. Crandall
6	Air Corps Officer Candidate School, Miami Beach, Florida	a. 31 May 1942 b. 1 May 1942 to 31 May 1942	$322.55	Capt. K.W. Hurst
7	Air Forces Officer Candidate School, Miami Beach, Florida	a. 30 June 1942 b. 1 June 1942 to 30 June 1942	$266.85	Capt. K.W. Hurst

Specification	Place	a. Date of making. b. Period of time covered.	Amount	Name of Finance Officer
8	Army Air Forces Officer Candidate and Officer Trng Station, Miami Beach, Florida	a. 31 July 1942 b. 1 July 1942 to 31 July 1942	$310.25	Capt. K.W. Hurst
9	Army Air Forces Officer Candidate and Officer Trng Station, Miami Beach, Florida	a. 31 August 1942 b. 1 August 1942 to 31 August 1942	$289.25	Major K.W. Hurst
10	Army Air Forces Officer Candidate and Officer Trng Station, Miami Beach, Florida	a. 30 Sept. 1942 b. 1 Sept. 1942 to 30 Sept. 1942	$287.85	Major K.W. Hurst
11	Army Air Forces Officer Candidate and Officer Trng Station, Miami Beach, Florida	a. 30 Nov. 1942 b. 1 Nov. 1942 to 30 Nov. 1942	$287.85	Major K.W. Hurst
12	Army Air Forces Basic Trng Com. #9, Miami Beach, Florida	a. 28 Feb. 1943 b. 1 Feb. 1943 to 28 Feb. 1943	$915.05	Major K.W. Hurst
13	Army Air Forces Basic Trng Com. #9, Miami Beach, Florida	a. 31 March 1943 b. 1 March 1943 to 31 March 1943	$359.25	Major K.W. Hurst
14	Army Air Forces Basic Trng Com. #9, Miami Beach, Florida	a. 30 April 1943 b. 1 April 1943 to 30 April 1943	$363.52	Major K.W. Hurst
15	Army Air Forces Basic Trng Com. #9, Miami Beach, Florida	a. 31 May 1943 b. 1 May 1943 to 31 May 1943	$369.25	Major K.W. Hurst

Specification	Place	a. Date of making. b. Period of time covered.	Amount	Name of Finance Officer
16	Army Air Forces Basic Trng Com. #9, Miami Beach, Florida	a. 30 June 1943 b. 1 June 1943 to 30 June 1943	$367.85	Major K.W. Hurst
17	Army Air Forces Basic Trng Com. #9, Miami Beach, Florida	a. 31 July 1943 b. 1 July 1943 to 31 July 1943	$369.25	Major K.W. Hurst
18	Mitchel Field, New York	a. 31 Aug. 1943 b. 1 Aug. 1943 to 31 Aug. 1943	$359.25	Lt. Col. John W. Reed
19	Mitchel Field, New York	a. 30 Sept. 1943 b. 1 Sept. 1943 to 30 Sept. 1943	$357.85	Lt. Col. R.M. Dougherty
20	Mitchel Field, New York	a. 31 Oct. 1943 b. 1 Oct. 1943 to 31 Oct. 1943	$359.25	Lt. Col. R.M. Dougherty
21	Mitchel Field, New York	a. 30 Nov. 1943 b. 1 Nov. 1943 to 30 Nov. 1943	$357.85	Lt. Col. R.M. Dougherty

He pleaded the statute of limitations in bar of Specifications 1 and 2 of the Additional Charge, which plea was sustained. He pleaded not guilty to the Charges and to all other Specifications. He was found not guilty of Specification 3, Charge I and guilty of all other Specifications and of the Charges. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for seven years. The reviewing authority approved the sentence but remitted four years of the confinement imposed and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution, briefly summarized, is substantially as follows:

(Because of a finding of not guilty and sustained pleas, Specification 3, Charge I and Specifications 1 and 2, Additional Charge, are not considered).

Specifications 3-21, Additional Charge:

On 5 December 1941, at Camp Blanding, Florida, the accused, then a second lieutenant, 192nd Field Artillery, executed an authorization for a Class E allotment to his wife, Grace B. McNeely, in the amount of $100.00 per month for a period of 12 months commencing 1 December 1941 and expiring 30 November 1942 (R. 26; Pros. Ex. 1).

The court took judicial notice of Section II, War Department Circular No. 4, 1942, the terms of which are as follows:

> "II. Class E. Allotments. - 1. All Class E allotments in effect on December 7, 1941, will be automatically extended for the duration of the war unless discontinued by written or radio authority of the allotter or officer responsible for personnel records of the individuals concerned. Officers responsible for preparation of pay rolls or individual pay vouchers will continue to show deductions for all Class E allotments in effect on December 7, 1941, regardless of date of expiration indicated on initial allotment....."

On 6 January 1942 the Finance Office, Washington, D. C., sent to the accused at Camp Blanding, Florida, a letter of acceptance of the allotment authorized by the accused. This letter acknowledged receipt and acceptance, as of December 1941, of the authorization for allotment and advised the accused that the first check in payment of the allotment would be mailed to the allottee on or about 10 January 1942; that the original of the letter should be retained in the accused's files; that a duplicate should be filed with the first pay voucher submitted after receipt of the letter; and that the first deduction for this allotment should be made from the pay of the allottee for the month of December 1941. The receipt of this communication at Keesler Field, Mississippi on or about 10 January 1942 was admitted by the accused to the investigating officer. The letter was received in evidence without objection (R. 29; Pros. Ex. 5).

Thereafter, the accused failed to make deductions for the monthly allotment on his pay vouchers and the Finance Office, Washington, D. C., forwarded monthly checks in the sum of $100.00 each to Grace B. McNeely, the accused's wife, all of which were cashed by, or on the order of, Mrs. McNeely. These facts are evidenced by certified, photostatic copies of pay vouchers and allotment checks, all of which were received in evidence without objection, except as to the checks for 10 January 1942, and 2 February 1942 (R. 27, 28; Pros. Ex. 2, 3, and 4).

The court was cautioned not to consider the pay vouchers for December 1941, and January 1942, nor the checks dated 10 January 1942

and 2 February 1942, because of the sustained plea of the statute of limitations (R. 27, 28).

On or about 7 October 1942, while the accused was stationed at Miami Beach, Florida, Lieutenant Colonel Herbert O. Peet, Inspector General's Department, Washington, D. C., (then Captain, Air Corps, Commanding Officer of the 650th School Squadron (Sp), AAFTTC, of which the accused was a member) received a communication from the Adjutant General inclosing a letter from the accused's wife to the Finance Officer, Washington, D. C. Mrs. McNeely's letter set forth, in substance, that it was impossible for her to live and support her family of four children (Barbara, 17 years; Herbert, Jr., 13 years; Harold, 11 years; and Bruce, 3 years) upon the allotment of $100.00 which she was receiving; that she was in a hospital for a gall-bladder operation and this would cause additional expenses; that she required and was receiving continual help from "relatives"; that she failed to get any reply or satisfaction in regard to the matter from the accused; and that, after waiting for a long time, she now applied for an entirely new allotment of $200 starting 1 October 1942 and to continue "for the duration".

In the letter from The Adjutant General, attention was invited to the fact that "The War Department desires and expects that members of the military service will make adequate provisions for the support of their dependents". It was requested that the accused be advised thereof expeditiously and that the Adjutant General be notified of action taken.

Accordingly, the accused was shown and he read the letters from the Adjutant General and from his wife, in the presence of his commanding officer. The accused then stated that he had made an allotment of $100 to his wife which was in effect at that time, and had habitually augmented this amount by other payments to take care of family expenses. He further stated that he intended to execute an additional, or new, allotment of $150.00 beginning 1 December 1942. As a result of the conversation Captain Peet suggested that an indorsement to the Adjutant General's letter be prepared, whereupon the accused prepared one which met with Captain Peet's approval and the latter signed it (R. 30-32; Pros. Ex. 6 and 7).

Sometime in November 1943, the accused, who was in Hempstead, Long Island, requested Mr. Lawrence J. Dietrich, a technical engineer residing in Hempstead, to take him to the bank in order that he might cash an allotment check made out to the accused's wife in the sum of $100. Mr. Dietrich took the accused to the Hempstead National Bank, received the check from the accused, indorsed it, received the money and gave it to the accused. The deposition of Mr. Dietrich, to which is attached a photostatic copy of the check in question, was received in evidence without objection (R. 33, 34; Pros. Ex. 8).

Specification 1, Charge I:

On the evening of 8 August 1944, Staff Sergeant Solomon Dumoff, I Squadron, 112th AAF Base Unit, Westover Field, Massachusetts, was driving his car from camp to Hartford, Connecticut and was accompanied by the accused (R. 6, 7). The distance between Westover Field and Hartford is approximately 20 or 30 miles (R. 26). The accused was carrying a bottle of whiskey in a cardboard container and the sergeant saw him take one drink of the liquor during the trip (R. 7, 8). He was also in possession of a gun which, together with the holster, he carried "as one would carry a package". The accused displayed the gun and said that he was taking it to his home in Hartford and intended to leave it there. At about 5:45 p.m. the accused left the sergeant's car on the corner of Albany and Sigourney Streets, about half a block from accused's home in Hartford (R. 7).

Mrs. Grace B. McNeely, wife of the accused, residing at 357 Sigourney St., Hartford, Connecticut, testified with the knowledge that she could not be compelled to do so (R. 14). She had been married to the accused for 21 years (R. 9) but, although still married to him, had started divorce proceedings against him (R. 13). When asked:

"Q. Describe in your own words as clearly as possible and as clearly as you can recollect the events that occurred on 8 August 1944",

she answered:

"A. You have all that." Then:

"Q. I am afraid, Mrs. McNeely, that we can't use that. I will have to have your story."

"A. My husband came to the house and threatened me with a gun. Will that be sufficient?"

"Q. I'm afraid not, Mrs. McNeely. We must go into the details and circumstances that occurred."

"A. I thought this was to be only two or three questions." (R. 9, 10)

When shown a statement she had made to the investigating officer in order to refresh her memory and asked:

"Q. Were you able to recollect anything further that (sic) that to which you have already testified?",

she replied:

"A. It's right there",

whereupon at the request of the trial judge advocate, the law member admonished her to answer the questions propounded (R. 11). Finally, at the conclusion of her testimony, when asked:

"Q. Do you remember your statement to the investigating officer?",

she replied:

"A. I have been over that so many times, it's about to drive me mad." (R. 19)

Nevertheless, she did testify that, at about half past six (R. 13, 20) on the evening of 8 August 1944, the accused came to the house where she was residing (R. 9, 20) for the purpose of having her sign a statement which, among other things, related to their children. She had been requested to sign such a statement on a previous occasion and had refused to do so (R. 11).

On direct examination she stated:

"A. He was, I would say, drunk and he did have the gun with him and he did threaten to shoot me if I didn't sign a certain statement....." (R. 10)

"Q. .....Do you know whether or not it was loaded?"

"A. Well, I don't know if it was loaded all the time. I know it was at one time."

"Q. When he was threatening you with it and requesting you to sign a statement, was it loaded then?"

"A. He filled the gun in front of me.... I saw him put the cartridges in the gun in front of me."

"Q. Did he do anything else....?"

"A. No, sir." (R. 10)

".....As soon as I saw he had the gun, naturally I said I would sign it....." (R. 11).

Upon cross-examination, the following colloquy took place:

"Q. Do you remember his exact words when he threatened to shoot you?"

"A. He didn't say 'I'm going to shoot you', if that's what you mean....."

"Q. Just what led you to believe that Lieutenant McNeely was going to shoot you?".....

"A. I think he told me right away when he came in the house that he was going to shoot me."

"Q. Did he say when he was going to shoot you?"

"A. That night."

"Q. Did he say that?"

"A. Yes."

"Q. Was that when he pulled out the weapon?"

"A. No, it was when I said I wasn't going to sign the paper."

"Q. Where was the weapon when he wanted you to sign the paper?"

"A. I really don't know....." (R. 12)

"Q. Did he ever point this gun at you?"

"A. I really don't know....." (R. 13)

When questioned by the court she gave the following answers:

"Q. Where was the pistol your husband had when you first saw it that evening?....."

"A. Beside him on the couch."

"Q. .....Was the pistol loaded when he threatened you with it?"

"A. I wouldn't know, sir." (R. 15)

Further questions by the prosecution elicited the following:

"Q. .....When you say he threatened you with a pistol, was it pointed at you?"

"A. I don't remember whether or not he had directly pointed it at me."

"Q. Would you demonstrate with a pencil or something the way he threatened you with it?"

"A. He had it in his hand and I don't know whether or not he pointed it." (R. 15)

Upon recross examination witness admitted telling the investigating officer that the accused asked her to sign a statement which she refused to sign, whereupon he produced a gun and placed it down beside him on the couch and that when she saw the gun, she then signed (R. 16). When asked whether this statement to the investigating officer constituted the extent of the accused's threat to shoot her she replied:

"If you want to call it that."

Further:

"Q. Did he, at any time that evening, say 'Grace, I'm going to shoot you with this gun?'"

"A. Well, he said....."

"Q. Please answer the question."

"A. Yes, he did. When we first started talking and he first had the gun."

"Q. Didn't you say not three minutes ago that he never threatened to shoot you?"

"A. I said that when you say didn't he say he was going to shoot me, he didn't say it in just those words.

"Q. What were his words?"

"A. He said I could make up my mind just what I wanted to do because I wasn't going to have very long." (R. 17)

Upon redirect examination when asked to reconcile her conflicting statements she replied:

"He had the gun in his hand most of the time.... This all seems pretty silly to me..... He was threatening me with the gun all the time he was there and had the gun in his hands." (R. 17)

Specification 2, Charge I

The only evidence adduced to support this Specification is as follows:

"Q. Mrs. McNeely, did he do anything else to you beside threaten you with the pistol?"

"A. Every time I started to get up off the chair he pushed me down."

"Q. How did he push you down?"

"A. By my shoulders with his hands."

"Q. Did he ever choke you?"

"A. No."

"Q. Did he ever have his hands around your neck?"

"A. Well, I don't think with the intention of choking me." (R. 11)

Upon cross-examination:

"Q. .....Did he apply any force?"

"A. He didn't push me down easily."

"Q. Did he choke you?"

"A. I really don't understand what you mean by choke. He put his hands around my neck and pushed me down and I had black and blue marks left from it." (R. 13).

At about 8 p.m. the accused left the home of his wife (R. 18), taking with him the pistol, which he placed inside of his shirt and leaving the holster at the house (R. 12, 22).

Miss Susan M. McNeely, sister of the accused, was present at the time the accused arrived at the house, but, after warning the accused not to hurt his wife, she took charge of the youngest son, left the accused and his wife together, and went outside (R. 11, 20, 23).

She returned to the living room, however, just as the accused was about to leave and saw him return for a bottle which he had forgotten and which he took along with him (R. 20) after stuffing the pistol inside of his shirt (R. 22).

Charge II and Specification:

At about 10:30 p.m. (R. 26) on 8 August 1944 Sergeant Arnold B. Glidden, 708th Military Police Battalion, was on duty at the Springfield, Massachusetts railroad station (R. 24). As the result of a report he approached the accused, who was in the station accompanied

by a woman. After retiring to the detention room in the station the sergeant asked the accused if he was carrying a revolver or gun and the accused admitted that he was. A .45 caliber Colt, automatic pistol without a holster, was then removed from inside the accused's shirt where he had tucked it under his belt. The pistol had no cartridge in the chamber but contained a fully loaded, ammunition clip (R. 25, 26).

4. The evidence for the defense, briefly summarized, is as follows:

Some time in November or December 1943 or January 1944, Lieutenant Colonel Joseph M. Murphy, Air Corps, 6th AAF Base Unit, Boston, Massachusetts, had a conversation with the accused in the Finance Office at Westover Field, in which the accused informed him that he had a letter from the office of Dependency Benefits advising him that he had failed to deduct a Class E allotment from his pay voucher for about 23 or 24 months. The accused was then told that the allotment would thereafter be deducted on his pay vouchers and that he would be paid only rental and subsistence allowances in the future until the full amount owed by the accused to the government was repaid.

From what the accused told him, Lieutenant Colonel Murphy "felt.....that he did not know this allotment was in effect.....that he made out his allotment thinking you could only take out an allotment when going overseas and that he did not go overseas and therefore thought it wasn't in effect....." (R. 35).

According to the witness the accused had repaid all the money which he owed the government (R. 36).

The court was then requested to take judicial notice of the following:

AR 35-5520, 4 March 1941, with especial reference to paragraph 5 which provided that allotments of pay could be made by officers "only while serving outside of the continental limits of the United States or in Alaska"; Change 1 of said regulation, dated 12 October 1942, which allowed them "only while serving or about to serve outside the continental limits of the United States or in Alaska"; and, Change 2 of the same regulation, dated 6 November 1942, which provided: "Officers may allot their base and longevity pay, monthly subsistence allowance based on a 30 day month, rental allowance and foreign service pay....." (R. 36).

The accused, having been advised of his rights, elected to testify as to the Charge and Specifications laid under Article of War 94 only (R. 36).

He testified that in October or November 1941, while a second lieutenant of Field Artillery on maneuvers in the Carolinas, he was encouraged to make an allotment to his wife in view of his impending departure for overseas. He filled out a form but did nothing further about it because of a rumor that his organization was not going overseas and his reluctance to give his wife an allotment unless necessary. However, in December 1941 it was again rumored that his organization was going overseas and the officers were again encouraged to make allotments, as a result of which, on 5 December 1941, he executed a form for a Class E allotment and left it with the Adjutant. Shortly thereafter he was transferred to the Air Corps and thereupon told a sergeant who was working in headquarters where he had lodged the application, "Forget that allotment. I'm not going overseas....."

Subsequently, while stationed at Biloxi, Mississippi, he received an original and duplicate notice from the Finance Officer, Washington, D. C., advising him that his allotment had been accepted and that payments would begin on or about 10 January 1942 (R. 37). Although the notice contained a statement in bold-face type that the first check in payment of the allotment would be mailed to the allottee on or about 10 January 1942 he failed to note it until the investigating officer later called it to his attention (R. 44). He took the forms to the Finance Officer at his post and explained that he did not want to have the allotment in effect because he and his wife did not get along too well and he did not want her to have it unless he was going overseas. She had refused to live with him and in this fashion he hoped to induce her to do so. From his conversation with the Finance Officer he got the "positive impression" that the allotment was not in force due to a regulation which the Officer showed to him, saying: "Don't worry about it.....unless you sign this form and return it to the Finance Department in Washington, it will not be in effect."

His wife never let him know that she was receiving the allotment because she knew he could stop it if he wished. However, he admitted having a "very vivid recollection" of the incident regarding the letter received by Captain Peet while the accused was his adjutant. At that time he told Captain Peet that he had just sent his wife two checks for $60.00 and wired her $50.00, and had promised that if she would come and live with him he would give her an allotment of $150.00 per month after the children got out of school. Captain Peet then asked the accused whether he (Captain Peet) could write an indorsement to that effect and the accused said "it was O.K." The indorsement to the communication was not made out by the accused but by the chief clerk. He denied ever seeing the correspondence from the Adjutant General to Captain Peet until shown to him by the investigating officer (R. 37, 38).

He admitted being socially acquainted with Mr. Dietrich of Hempstead, Long Island, who lived only three blocks away from the home where the accused had lived with his wife and family for about five weeks. He had asked Mr. Dietrich to go to the bank but not to cash a check, and if the check in question was indorsed by Mr. Dietrich it must have been given to him by Mrs. McNeely and not the accused. He denied ever seeing the check. Mr. Dietrich was unemployed at the time and was in and out of the accused's home daily, took Mrs. McNeely shopping two or three times a week and met accused's daughter when she came in by train (R. 39).

On cross-examination, although he knew of no reason why Captain Peet should be biased or prejudiced against him, he stated that he must refute his testimony (R. 40). In his opinion the indorsement to the Adjutant General's letter was merely an ordinary clerical or administrative error. He did not prepare the indorsement and never saw it (R. 42, 43), and he denied telling Captain Peet he had made an allotment (R. 42).

He admitted that, although he and his wife lived together for a month while he was at Hempstead, Long Island, during November 1943 (R. 40, 46), they never discussed an allotment nor did she ever mention one although she continually asked for money; in fact, between January 1942 and October 1943, while they frequently discussed the manner in which the family (Mrs. McNeely and four children) were living, an allotment was never mentioned. He again stated that the reason she refrained from mentioning it was because of her fear that, if he knew about the allotment she was receiving, he would cancel it. He had told her, however, that if she came to live with him he would give her anything she wanted; but, if she did not he would "make it uncomfortable for her financially" (R. 41).

When questioned by the court he admitted that he did not "thoroughly" read the letter of acceptance of his allotment by the Finance Department, but he did read the portion which directed him to file the duplicate copy with his first pay voucher after its receipt. He paid no attention to this, however, after being told by the Finance Officer at his post "to forget about it", that the allotment would not go into effect because he wasn't going overseas, and that it would not be paid unless he sent word back to the Finance Office in Washington. It never entered his mind that there should be some final cancellation of the allotment (R. 45).

Upon recross-examination, when asked how he expected his wife and four children to get along without an allotment, he said that he believed defense counsel had in his possession cancelled checks to show that the accused was supporting his wife adequately and that he had given his wife "probably $80 per month plus the rent" (R. 46).

5. To obtain a complete picture of the offenses with which the accused stands charged it is necessary to make some observations at the outset.

It is apparent that all of the charges actually arose out of domestic difficulties which were never resolved and which resulted in divorce proceedings on the part of the wife. The accused and his wife have been married for 21 years and are the parents of four children, now about 19, 15, 13 and 5 years old, respectively. It is likewise evident that the accused wished to have his wife live with him at his various posts and stations, which the wife, presumably for the best interests of the children, declined to do. Throughout the accused's testimony it is clear that he intentionally used his wife's precarious financial situation as a means of coercion in the matter and this should be considered in deciding his guilt or innocence of some of the offenses charged.

It should also be borne in mind that much which might otherwise have been elicited by the prosecution was barred by a rule of evidence; for the wife was prohibited from testifying upon any except Charge I and the Specifications thereof (par. 120d, MCM 1928).

The determination of the accused's guilt or innocence of the offenses alleged in the Specifications of the Additional Charge rests wholly upon the question of his knowledge and intent when he presented the pay vouchers in question as a result of which he was paid his full monthly compensation and allowances at the same time that the government, at his direction, had sent monthly allotment checks to his wife.

Much was made by the defense of the state of Army Regulations which, at the time the allotment was requested by the accused, provided that allotments could be made only by officers who were serving outside of the continental limits of the United States or in Alaska. However that may be, it is nowhere denied that the requested allotment went into effect, nor is it asserted that the allottee failed to receive the allotment checks or the accused his full pay; consequently the only inquiry necessary is whether the Army Regulations misled the accused and induced the innocence of the true status of affairs which he protested.

To fortify this claim of good faith the accused maintained: (1) that he had directed a "sergeant" who "worked" at the headquarters of the post where he had lodged his formally executed application for allotment, to disregard it; (2) that when, sometime in January 1942, he nevertheless received duplicate written notices of the acceptance of the application, containing instructions to file one of them with his next pay voucher after receipt of the letter, he sought advice from the Finance Officer at Biloxi, Mississippi and was told by him to "forget about it", although the letters contained further notice, in bold type, that the first allotment check would be mailed to the wife

on or about 10 January 1942, and (3) that, depending upon the Army Regulations and this advice, he paid no further attention to the matter and was never aware of the payments to his wife thereafter until he arrived at Westover Field, Massachusetts in December 1943.

Were it not for other evidence to the contrary, this plausible defense would be highly persuasive and might cast a grave doubt upon his guilt.

It is unnecessary to restate in detail the facts which destroy the appearance of good faith which the accused would create or to go to great pains in explaining how his credibility was impeached; a succession of simple events conclusively shows these matters.

In October 1942 he was called before Captain Peet, his commanding officer, for the purpose of reading and giving an explanation to a complaint made by his wife to the Finance Department, at Washington, of the insufficiency of the $100 allotment she was then receiving. The accused thereupon admitted he had made an allotment which he had habitually augmented with other remittances and promised to execute an additional, or new, allotment of $150.00 per month beginning 1 December 1942. These matters were incorporated in an indorsement signed by the Captain and transmitted to the Adjutant General as directed. Captain Peet, who later became a Lieutenant Colonel in the Inspector General's Department, testified to these facts and, although the accused denied them, stating that he had never seen the correspondence and that his explanation had been misconstrued in the indorsement, they are wholly consistent with the circumstances. It is inconceivable that Captain Peet, with no apparent motive to do so, would have withheld from the accused an opportunity to read the communications which he was ordered, by the Adjutant General, to bring to the accused's attention and, if the accused read the letter from his wife, as credible testimony shows he did, he must have been aware of the receipt, by his wife, of the monthly allotment checks. It matters little who prepared the indorsement for it contained information which, obviously, could have been furnished only by the accused and no one else.

Of still more persuasive character is the strange incident which occurred in November 1943 when the accused and his wife were temporarily living together at Hempstead, Long Island. At some time during this period the accused persuaded Mr. Dietrich, a friend and neighbor, to take him to the bank for the purposes of cashing a check, whereupon an allotment check for November 1943, payable to Mrs. McNeely in the amount of $100.00 and indorsed by her, was given by the accused to Mr. Dietrich, who also indorsed it and obtained the cash for the accused at the bank in the accused's presence. This the accused likewise denied though he could assign no reason for

any bias or prejudice on the part of the neighbor which should induce him to give false testimony against the accused.

There was no attack made upon the credibility of either Lieutenant Colonel Peet or Mr. Dietrich and the record discloses nothing which constitutes impeachment of their testimony other than the accused's denials.

It is also singular that, according to the accused, no mention was ever made, by one to the other, f the matter of an allotment during the month in which he and his wife lived together in Hempstead. By his own admissions it is evident that he had promised an allotment of $150 to his wife on condition that she live with him and she must have been a phenomenal wife to refrain from any mention of the matter during this period of time, especially since, according to the accused, money matters were the constant subject of joint discussion. Yet this is no more incredible than the naive suggestion of the accused that she remained silent about the allotment in order that he would not discover it and then discontinue it. Such a pretense was but a bold presumption upon the possible gullibility of the court and was evidently rejected, together with the other implausible explanations made by the accused.

Accordingly, the record is found legally sufficient to sustain the findings as to these Specifications even though it was shown that the accused had made reimbursement in full of all overpayments made to him. Although the government has suffered no loss in the transactions, the fraud was complete when perpetrated and while repayment may be considered in mitigation or extenuation it constituted no defense.

When, in December 1943, the accused started to reimburse the government for the overpayments made to him, the allotment was discontinued. This did not tend to ameliorate the domestic discord between the accused and his wife and seven months later there was an altercation between them which resulted in the filing of Charges I and II.

Specification 1 of Charge I alleges assault with intent to do bodily harm upon his wife with a dangerous weapon, to wit, a loaded pistol. The proof shows that he went from camp to his wife's house in Hartford, Connecticut, carrying a bottle of liquor and a pistol in a holster. On the way he took a drink from the bottle and explained that he was taking the pistol home and would leave it there. When he arrived at his wife's residence he was in a drunken condition and demanded that she sign some papers having to do with the children. She had theretofore refused to sign them, so that, as a measure of duress, the accused evidently made some display of the pistol to coerce her into signing. This much is evident from the vague, indefinite, contradictory and reluctant testimony of the wife; but the evidence

of record falls far short of sustaining the serious offense alleged in this Specification. Specific intent must be established either by independent evidence or by inference from the act itself (par. 126a, MCM 1928). Yet here there is neither direct nor circumstantial proof beyond reasonable doubt of the intent to do bodily harm which is the gravamen of the offense. The accused produced and loaded the weapon in his wife's presence and it may be inferred that, under a fear generated by its display, she did sign the paper; but it is not shown that the accused intended to do any more than he accomplished by the potential threat which his possession of the pistol constituted.

From a careful evaluation of the testimony of Mrs. McNeely it cannot be said that there is clear and unequivocal evidence of any oral threat by the accused, or if some threat was made that it was then accompanied by the menacing display of the weapon. If only Mrs. McNeely's conclusions are to be entertained, then it may be inferred that the accused threatened to do her bodily harm, while holding the pistol in his hand, unless she signed the paper. When pinned down to specific evidence of what happened, however, it appears that her conclusions were based upon accused's remark that she "wasn't going to have very long" to make up her mind, plus his general conduct and the proximity of the pistol. Her testimony does not clearly establish when and how the accused used the weapon in connection with the supposed oral threat. Contradictions and inconsistencies appear in her testimony, and between her testimony and her previous statement. Though informed that she was not compelled to testify, she did testify, but with obvious reluctance throughout. When the only evidence relied upon for conviction consists of contradictory statements by a sole witness as to the facts, the rule of reasonable doubt cannot be evaded by accepting, as established, those facts which favor conviction while rejecting those which would prevent it. The law provides no standard with which to measure the credibility of an uncorroborated witness who directly contradicts his own material evidence, nor will it allow such evidence to be lifted from the twilight zone of doubt by the simple expedient of conjecture as to what is true and what is false when there is no other evidence to support either determination.

Therefore, where, as in this case, the state of the evidence leaves any reasonable doubt of the specific intent to do bodily harm, a finding of such intent cannot be sustained (CM 195931, Willis, 2 BR 311; CM 240041, Horhozer, 25 BR 345; CM 255203, King, 36 BR 55).

There is, however, sufficient evidence to support a finding of assault with a dangerous weapon in violation of Article of War 96 (Cases cited above and CM 230478, Maynor, 17 BR 375).

The offense alleged in Specification 2 of Charge I is assault with intent to do bodily harm by choking about the neck and throat. Here again the proof is dubious. Mrs. McNeely first denied that the accused had choked her; then indicated her doubt as to what was meant

by the term "choking"; and finally said that she had black and blue marks on her neck from the rough manner in which the accused pushed her into a chair whenever she tried to get up. Again, there is the same type of evasive and contradictory testimony. Admittedly it is frequently necessary to resort to repeated and persistent inquiry in order to induce a witness to make a desired statement, but such was not the case as to these facts. The contradictory evidence is contained in the answers to a few simple questions. The Manual for Courts-Martial provides that the offense here charged is an assault aggravated by the specific present intent to do bodily harm by means of the force employed (par. 149n, MCM 1928). The black and blue marks on Mrs. McNeely, assertedly the result of the accused's hands around her neck, may have been unintentionally caused by his rough insistence that she remain seated in her chair; she herself testified that she did not think he had any "intention of choking (her)", and certainly her state of mind in this situation is far more persuasive on the question of intent than the contrary opinion of the court arising solely from speculation upon the vague and indefinite facts to which she testified. Thus, proof beyond reasonable doubt of the specific intent to do bodily harm is likewise lacking as to this Specification and the evidence will support no more than a finding of guilty of assault and battery in violation of Article of War 96.

The Specification of Charge II alleges the carrying by the accused, of a concealed weapon. The laws of the State of Massachusetts, where the act was committed, make it a punishable offense to carry a pistol, or other specified weapon, without a license to do so and provide for confiscation by the state of any weapon carried in violation thereof (Chapter 269, sec. 10, Annotated Laws of Massachusetts). Thus, the offense denounced is not the carrying of a weapon in a concealed manner but any unlicensed carrying of a weapon, concealed or unconcealed. It is obvious that the enforcement of this statute against personnel of the Army of the United States stationed within the geographical limits of the State of Massachusetts would result in an obnoxious conflict of the state law with the superior sovereignty, for certainly officers and soldiers entitled to bear arms in time of war cannot be compelled to obtain a license to do so whenever they bear such arms while away from governmental posts and stations and on the streets or highways of Massachusetts. It is equally clear that the confiscation of property of the United States under such circumstances would be preposterous. This was evidently recognized in the preparation of the Specification, which is not laid in terms as a violation of the State law.

Is such an offense nevertheless prejudicial to good order and military discipline or such as might tend to cast discredit upon the military service? We think that it is. Ordinarily the bearing of arms by a person in the military service is a common incident of the service.

In time of war it is concomitant with the status of any member of the armed forces and the open display of the weapons of war is a proud and honorable badge of such service and not wrongful per se. But the same motives which pervade the mind of man in civil life often influence him when in military service. So it is, that a soldier, like a civilian, may contemplate the wrongful and unlawful use of a weapon and, in order to hide the means by which he proposes to do the wrong, will conceal it on his person rather than bear it openly where it may be seen. If, then, as in this case, he is charged with the wrongful concealing of such a weapon and the evidence shows that such concealment was an incident to the unlawful use of the previously, or later, concealed weapon, he may properly be found guilty of an offense to the prejudice of good order and military discipline and of a nature to bring discredit upon the military service.

It is noted that Charges I and II and the Specifications thereof, were filed on 16 August 1944, and were referred for trial on 27 January 1945, together with the Additional Charge and its Specifications, which had not been filed until 1 January 1945, over a year after reimbursement by the accused of the overpayments made, as alleged in the Specifications of the Additional Charge, had commenced. The statute of limitations allows a period of three years within which to prosecute a person subject to military law for an offense in violation of Article of War 94 but Article of War 70 is specifically directed against such delays as are evidenced by the proceedings in this case, and there is no explanation of the five months' interval between the filing of Charges I and II and their reference for trial. When any person subject to military law is placed in arrest or confinement, immediate steps will be taken to try the person accused or to dismiss the charge and release him, and when a person is held for trial by general court-martial, the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction. Unnecessary delay on the part of an officer charged with these responsibilities is a military offense which may be punished as a court-martial may direct.

6. Records of the War Department disclose that the accused was born in Norwich, Connecticut, is 45½ years of age, married, and has four minor children. He attended grammar school, Norwich Free Academy, Goddard Seminary (from which he was graduated), Middlebury College and the University of Vermont. Thereafter he was employed for eight years as foreman of shipping and receiving clerks and for eight years as an assistant in the sales and advertising department, both periods with the American Thermos Bottle Company. From 11 December 1920 to 23 February 1938 he served as an enlisted man of the 192d Field Artillery, National Guard of Connecticut. On 23 February 1938 he was commissioned a second lieutenant, Field Artillery, N.G.U.S. He was called to active duty on 24 February 1941 and served at Camp Blanding, Florida until

24 December 1941 when he was assigned to Station Complement, Air Corps Technical School, Biloxi, Mississippi. On 1 February 1942 he was promoted to first lieutenant, subsequent to which he served at Mitchel Field, New York and Westover Field, Massachusetts. On 6 May 1944 he was officially reprimanded under Article of War 104 for absence without leave for one day.

7. The court was legally constituted and had jurisdiction of the accused and the offenses charged. Except as noted no errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the finding of guilty of Specification 1 of Charge I as involves a finding of guilty of an assault with a dangerous weapon in violation of Article of War 96 and legally sufficient to support only so much of the finding of guilty of Specification 2, Charge I as involves a finding of guilty of assault and battery in violation of Article of War 96, but is legally sufficient to support the findings of guilty of Charge II and the Specification thereof, and the Additional Charge and the Specifications thereof, and to support the sentence and warrant confirmation of the sentence. The sentence, as approved by the reviewing authority, is authorized upon conviction of a violation of either Article of War 94 or Article of War 96.

Fletcher R. Andrews, Judge Advocate

Herbert R. Frederick, Judge Advocate

_____, Judge Advocate

SPJGQ
CM 276703

1st Ind

JUN 5 1945

HQ ASF, JAGO, Washington, D. C.

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Herbert L. McNeely (0-363428), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of Specification 1, Charge I (assault with intent to do bodily harm with a dangerous weapon), of Specification 2, Charge I (assault with intent to do bodily harm) and of Charge I, in violation of Article of War 93, of the Specification of Charge II (carrying concealed weapon) and of Charge II, in violation of Article of War 96, and of Specifications 3-21, inclusive, Additional Charge (19 false claims against the government whereby he obtained $100 per month as allotment to his wife without making deductions on his pay vouchers), and of the Additional Charge, in violation of Article of War 94. A plea of the statute of limitations was sustained as to Specifications 1 and 2, Additional Charge, and he was found not guilty of Specification 3 of Charge I. No evidence of previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for seven years. The reviewing authority approved the sentence but remitted four years of the confinement imposed and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board of Review is of the opinion that the record of trial is legally sufficient to sustain only so much of the findings of guilty of Specification 1, Charge I as involves a finding of guilty of assault with a dangerous weapon, in violation of Article of War 96 and only so much of the finding of guilty of Specification 2, Charge I, as involves a finding of guilty of assault and battery in violation of Article of War 96, but is legally sufficient to support the findings of guilty of Charge II and the Specification thereof and the Additional Charge and the Specifications thereof and to support the sentence and warrant confirmation thereof. I concur in that opinion.

This officer has been married for 21 years and has four children, now 19, 15, 13 and 5 years old, respectively. He has had domestic difficulty which has resulted in the wife suing for a divorce. In

December 1941, though reluctant to do so unless his wife agreed to live with him, he applied for a monthly allotment of $100 of his pay to his wife. This allotment went into effect in January 1942 and was paid monthly to and including November 1943. During all this period he likewise received his full monthly pay because he made no deductions for the allotment on his voucher. This, he claims, was through ignorance of the true state of affairs and against his express wishes, but the proof shows that he must have been aware of the allotment payments and permitted them to go on while accepting his full pay at the same time. In November 1943 he was definitely apprised of his wrongful acceptance of overpayments, and reimbursement was immediately commenced by retention of his base pay until the indebtedness was discharged. In August 1944 he became involved in an altercation with his wife involving the children and, in her home, he made a threatening display of his Army pistol and thus coerced her into signing a paper relating to them. At the same time he treated her with unnecessary roughness and forcibly pushed her back into a chair by placing his hands on her neck, at the shoulders, whenever she sought to get up and thus caused black and blue marks on her skin. After this quarrel he stuck the pistol inside of his shirt and left but was apprehended later at a railroad station where the pistol was found tucked beneath his belt inside of his shirt. The charges based upon the mistreatment of his wife, although filed in August 1944 were not referred for trial until 27 January 1945, together with the charges involving the false claims which, although the fraud had been discovered in November 1943 and restitution had been made by withholding subsequent base pay of the accused, were not filed until 1 January 1945. Such unexplained and unreasonable delay is not in accord with the spirit of Article of War 70 and the policies of this office. However, it constitutes no condonation, and clemency because of any mitigating or extenuating circumstances has already been extended. I recommend that the sentence as approved by the reviewing authority be confirmed but that the forfeitures be remitted and that, as thus modified, the sentence be carried into execution. I further recommend that the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, be designated as the place of confinement.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

MYRON C. CRAMER
Major General
The Judge Advocate General

2 Incls
1 Rec of Trial
2 Form of Action

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence as approved by reviewing authority confirmed but forfeitures remitted. G.C.M.O. 303, 7 Jul 1945)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGH-CM 276706

22 MAR 1945

UNITED STATES	)	THIRD AIR FORCE
v.	)	Trial by G.C.M., convened at Drew Field, Tampa, Florida, 15 February 1945. Dishonorable discharge, total forfeitures and confinement for three (3) years.
Second Lieutenant WILLARD CAMPBELL (0-805006), Air Corps.	)	

OPINION of the BOARD OF REVIEW
TAPPY, GAMBRELL and TREVETHAN, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 58th Article of War.

Specification: In that Second Lieutenant Willard Campbell, Army Air Forces Officers Replacement Pool, Atlantic City, attached to Seventh Detachment, 301st Army Air Forces Base Unit, Squadron "R", Third Air Forces Personnel Depot, Plant Park, Tampa, Florida, did, at Plant Park, Tampa, Florida, on or about 30 November 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at West Palm Beach, Florida, on or about 5 January 1945.

CHARGE II: Violation of the 96th Article of War. (Finding of not guilty).

Specifications 1 to 13, incl., and 15 to 22, incl: (Findings of not guilty).

Specification 14: (Nolle prosequi entered).

Accused pleaded guilty to the Specification of Charge I except the words "desert the service of the United States and did remain absent in desertion" substituting therefor the words, "absent himself without proper

leave and did remain so absent", of the excepted words not guilty, of the substituted words guilty, not guilty to Charge I but guilty of a violation of Article of War 61, and not guilty to Charge II and all Specifications thereof. He was found guilty of the Specification of Charge I except the words "desert the service of the United States" and "in desertion", substituting therefor respectively the words "absent himself without leave", of the excepted words not guilty, of the substituted words guilty and not guilty of the Charge but guilty of a violation of Article of War 61 and not guilty of Charge II and all Specifications thereof. Evidence of one previous conviction for absence without leave was introduced. He was sentenced in the present case to dismissal, total forfeitures and confinement for five years. The reviewing authority approved the sentence but remitted two years of the confinement and forwarded the record of trial for action under Article of War 48.

3. The prosecution introduced evidence to show that on 30 November 1944, accused absented himself without leave from his organization, then stationed at Tampa, Florida (R. 18; Pros. Ex. A). From 18 December 1944 to at least 21 December 1944 accused occupied a room in the Orange Blossom Hotel, in Sarasota, Florida, where he registered under the name of "Lt. Raymond McCall" (R. 19-22; Pros. Ex. B). On 5 January 1945 he was apprehended while occupying a room at the Surfside Hotel, West Palm Beach, Florida. Accused's name did not appear on the hotel register, but the name Lieutenant McCall did appear thereon (R. 24-25).

4. After accused's rights had been explained to him he elected to make an unsworn statement. The only portion thereof relevant here was accused's assertion that during his absence he registered "numerous times" in hotels under his own name and using his correct serial number (R. 57).

5. The prosecution's evidence establishes accused's absence without leave from 30 November 1944 to 5 January 1945 and demonstrates that his plea of guilty to that offense was not improvidently entered. The record of trial sustains the findings of guilty under Charge I and its Specification.

6. Accused is 21 years of age and is married. According to the records of the War Department, after graduation from high school accused was employed by Douglas Aircraft Company from June 1941 to September 1942. He enlisted in the Air Force Enlisted Reserve as an aviation cadet on 7 May 1942, was called to active duty on 1 November 1942, successfully completed the advanced course in two-engine flying at Blytheville Army Air Field, Blytheville, Arkansas, 30 June 1943, and was commissioned second lieutenant, Air-Reserve, and ordered to active duty on that date. On 12 August 1944, accused was convicted by general court-martial of absenting himself without leave from 5 July 1944 to 19 July 1944 and was sentenced to dismissal (See CM 262158). The confirming authority confirmed the sentence but suspended execution of it

during accused's good behavior. Subsequently thereto accused received punishment under Article of War 104 on two occasions, first for absenting himself without leave from 9 September 1944 to 13 September 1944, and secondly for violating a uniform regulation on 14 November 1944.

7. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence, as approved by the reviewing authority, and to warrant confirmation of the sentence. The sentence imposed is authorized upon a conviction of a violation of Article of War 61.

On Leave, Judge Advocate.

William H. Sandrell, Judge Advocate.

Robert E. Trevillian, Judge Advocate.

SPJGH-CM 276706 1st Ind

Hq ASF, JAGO, Washington 25, D. C. MAY 8 - 1945

TO: The Secretary of War

1. Herewith are transmitted for the action of the President the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Willard Campbell (0-805006), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. Previously, on 12 August 1944, accused had been convicted by general court-martial of absenting himself without leave from 5 July 1944 to 19 July 1944 and had been sentenced to dismissal. The confirming authority confirmed the sentence but suspended execution thereof during accused's good behavior. War Department records also reveal that accused subsequently received punishment under Article of War 104 on two occasions, first for absenting himself without leave from 9 September 1944 to 13 September 1944 and secondly for violating a uniform regulation on 14 November 1944. I recommend that the sentence as approved by the reviewing authority be confirmed but that the forfeitures be remitted and that the sentence as thus modified be carried into execution and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

3 Incls
1. Record of trial
2. Dft ltr for sig S/W
3. Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence as approved by reviewing authority confirmed but forfeitures remitted. G.C.M.O. 181, 9 Jun 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGK-CM 276755

21 MAR 1945

UNITED STATES	)	TANK DESTROYER CENTER
v.	)	Trial by G.C.M., convened at Camp Hood, Texas, 23 February 1945. Dismissal.
First Lieutenant EUGENE B. MORRIS (0-1823333), Infantry.	)	

OPINION of the BOARD OF REVIEW
HEPBURN, MOYSE and ANDERSON, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 95th Article of War.
(Finding of not guilty).

Specification 1: (Finding of not guilty).

Specification 2: (Nolle prosequi by order of the convening authority (R. 4)).

CHARGE II: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant EUGENE B. MORRIS, Tank Destroyer Officer Replacement Pool, Tank Destroyer Replacement Training Center, North Camp Hood, Texas, did, at North Camp Hood, Texas, on or about 16 August 1944, wrongfully borrow from Private Raymond E. Moore, the sum of Twenty ($20.00) Dollars, lawful money of the United States to the prejudice of good order and military discipline.

Specification 2: In that First Lieutenant EUGENE B. MORRIS, Tank Destroyer Officer Replacement Pool, Tank Destroyer Replacement Training Center, North Camp Hood, Texas, did, at Waco, Texas, on or about 18 July 1944, wrongfully and unlawfully make and utter to the Lowich Clothing Company of Waco, Texas a certain check, in words and figures as follows, to wit:

Gatesville, Texas 18 July 1944 No.____

Guaranity Bank & Trust Co.

Pay to the order of Lowich Clothing Co -- $25.00 xx

Twenty five and no/100 ----------Dollars

For _____ 01823333

1st Lt Eugene B Morris
Co A-137 Bn
No Cp Hood, Texas

and by means thereof did fraudulently obtain from the said Lowich Clothing Company the sum of Twenty-five ($25.00) Dollars, the lawful money of the United States, he, the said First Lieutenant EUGENE B. MORRIS, then well knowing that he did not have and not intending that he should have sufficient funds in the said Guaranty Bank & Trust Company for the payment of said Check.

Specifications 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, and 19 are substantially in the same form as Specification 2 except as to place, date, amount and the name of person from whom the cash or services were obtained. These variations were as follows:

Specification	Place	Date	Amount	Person defrauded	Obtained
3	Waco, Texas	12 Aug 44	$25.00	Armstrong Jewelers	$25 cash
4	" "	13 Aug 44	$25.00	Lyons Tea Room	$25 "
5	" "	15 Aug 44	$5.00	Texas Cafe	$5 "
7	Temple, Texas	11 Sept 44	$10.00	Mackey's Drug Co.	$10 "
8	Ft. Worth, Tex.	16 Sept 44	$25.00	First Nat'l Bank, Ft. Worth, Tex.	$25 "
9	Belton, Texas	23 Sept 44	$25.00	First Nat'l Bank, Belton Texas	$25 "

Specification	Place	Date	Amount	Person defrauded	Obtained
10	Belton, Texas	29 Sept 44	$20.00	Peoples Nat'l Bank, Belton, Texas	$20 cash
11	Ft. Worth, Texas	5 Oct 44	$20.00	Texas Hotel	$20 "
12	" "	6 Oct 44	$20.00	" "	$20 "
13	" "	7 Oct 44	$25.00	Continental Nat'l Bank	$25 "
14	" "	9 Oct 44	$15.00	Texas Hotel	$15 cash and services
15	" "	9 Oct 44	$20.00	Union Bank & Trust Co.	$20 cash
16	Houston, Texas	10 Oct 44	$20.00	Rice Hotel	$20 "
17	" "	11 Oct 44	$25.00	Second Nat'l Bank	$25 "
18	" "	11 Oct 44	$25.00	City Nat'l Bank	$25 "
19	Temple, Texas	13 Oct 44	$15.00	South Side Drug Co.	$15 "

Specification 6: In that First Lieutenant EUGENE B. MORRIS, Tank Destroyer Officer Replacement Pool, Tank Destroyer Replacement Training Center, North Camp Hood, Texas, did, at Gatesville, Texas, on or about 8 September 1944, wrongfully fail to maintain sufficient bank balance in the Guaranty Bank and Trust Company to meet a check made and uttered by him to Mackey's Drug Company of Temple, Texas, in words and figures as follows, to wit:

Gatesville, Texas, 8 Sept 1944 No.__

GUARANTY BANK & TRUST CO. 88-1628

Pay to the order of Mackey's Drug $10.00 xx

Ten and no/100 Dollars

Eugene B. Morris
1st Lt.
Ward 120A 01823333
McClosky
Hosp

He pleaded not guilty to the Charges and the Specifications. He was found not guilty of Specification 1 of Charge I and Charge I, and guilty of Charge II and all of its Specifications. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution:

It was stipulated that the accused was in the military service at the time of the commission of the offenses charged and at the time of trial (R. 14).

Specification 1 of Charge II

Sergeant Joseph F. Savage testified that on 16 August 1944 the accused was an officer in the same organization and asked him to borrow for him the sum of $20.00 from Private Raymond E. Moore. In compliance with this request Sergeant Savage borrowed $20 from Private Moore and delivered it to the accused. Private Moore asked Sergeant Savage for the repayment of the money several times thereafter until he, Private Moore, was "shipped out" (R. 27-29).

Specification 2 of Charge II

Mr. Sander Lowich, manager of Lowich Clothiers, Waco, Texas, testified through deposition that on 18 July 1944 the accused came into his store and asked him to cash a check in the sum of $25.00. The check was drawn on the Guaranty Bank and Trust Company of Gatesville, Texas. In compliance with this request the witness gave accused $25.00 in exchange for the check. He deposited the check in his bank and one week later the check was returned marked "account closed". After making several demands for payment, on 11 December 1944 the witness received payment in the sum of $25 from a Captain Conlin, representing the accused (R. 19; Ex. K. L, M, N, O, P).

Specification 3 of Charge II

Rebecca Kimbrough, credit manager for the Armstrong Jewelry Co., Waco, Texas, testified that on 12 August 1944 accused came into the Armstrong Jewelry Co. store and asked her to cash his personal check of $25. In compliance with this request she gave accused $25 in cash. She thereupon deposited the check and 4 days later it was returned marked "insufficient". She wrote several letters to the accused regarding payment and on 12 December 1944 received the payment from Captain Conlin, representing the accused (R. 23; Ex. Q, R).

Specification 4 of Charge II

Mrs. Myrtle Lyons, proprietor of Lyons' Tea Room, Waco, Texas, testified that on 13 August 1944 the accused came into her tea room and asked her to cash his check for $25 drawn on the Guaranty Bank and Trust Co. of Gatesville, Texas. In compliance with this request she gave accused $25 in cash in exchange for the check. She deposited the check in her bank and shortly thereafter it was returned marked "insufficient." After making several demands upon the accused for payment on 18 December 1944 she received payment (R. 24-25; Exs. S, T).

Specification 5 of Charge II

Alex P. Castillo, owner and operator of the Texas Cafe, Waco, Texas, testified that on 15 August 1944 in his cafe, the accused requested the witness to cash his personal check for $5 drawn on the Guaranty Bank and Trust Company of Gatesville, Texas. In compliance with this request the witness gave the accused $5 in exchange for the check which the accused made and delivered to him at that time. He deposited the check to his account and 5 days later the check came back marked "insufficient funds". After making several demands for payment he received a letter in December from Captain Conlin representing the accused, inclosing payment in full for the amount due (R. 26; Ex. U, V).

Specifications 6 and 7 of Charge II

Vince Matula, Pharmacist, Mackey's Drug Company, Temple, Texas, testified that on 8 and 11 September 1944 accused came into the drug store and upon each occasion requested him to cash the accused's personal check for $10. In compliance with this request the witness gave accused, upon each occasion, $10 in cash in exchange for the accused's check. The checks were drawn on the Guaranty Bank and Trust Company, Gatesville, Texas (R. 32; Ex. W).

Miss Nell Dooley, bookkeeper, Mackey's Drug Company, testified that the two checks cashed for the accused by Mr. Matula were deposited shortly after their receipt and were returned marked "account closed". On 15 December 1944 $20 was received in full payment of the checks from Captain Conlin representing the accused (R. 33; Exs. X, Y, Z).

Specification 8 of Charge II

Mr. C. E. Gillham, First National Bank, Fort Worth, Texas, testified that on 16 September 1944 accused came into the bank and asked the witness to "O.K." accused's check for $25 drawn on the Guaranty Bank and Trust Co., Gatesville, Texas. The bank teller thereupon cashed the check by giving the accused $25 in cash in exchange. When presented to the drawee bank it was returned unpaid marked "account closed". On 11 December 1944 payment of the check was received from Captain Henry T. Conlin representing the accused (R. 34-35; Exs. AA, AB).

Specification 9 of Charge II

Carlos G. Parker, cashier of the First National Bank, Belton, Texas, testified that on 23 September 1944 accused came into the bank and asked him to cash his personal check for $25. After satisfying himself as to the identity of the accused, the witness gave the accused $25 in cash in exchange for his check. The check was drawn on the Guaranty Bank and Trust Co., Gatesville, Texas and when presented for payment through the usual channels it was returned marked "account closed." He made several demands upon accused for payment and on 11 December 1944 received a letter from Captain Henry T. Conlin inclosing full payment of the check (R. 36; Exs. AC, AD).

Specification 10 of Charge II

J. V. Kelly, Executive Vice President of the Peoples National Bank, testified that on 29 September 1944, a check drawn on the Guaranty Bank and Trust Company, Gatesville, ~~Texas,~~ in the sum of $20.00 made by Eugene B. Morris which check was returned marked "Account closed", was brought to his attention (R. 38). The check (Ex. AF) is dated 23 September 1944; the ledger sheet of accused's account with the bank (Ex. BD) shows that on and after 12 September 1944 accused had no funds in his account. The admission of the accused to Captain Conlin that he owed the Peoples National Bank $20.00 (R. 39), comparison of signatures, and the payment by Captain Conlin of this account for the accused establishes that the accused is the person who issued the check and that he received value in exchange therefor.

Specifications 11, 12 and 14 of Charge II

Otis English, Assistant Manager, Texas Hotel, Fort Worth, Texas, testified that on 5 October 1944 accused asked him if he would approve a check for him. In his presence accused wrote out a check (Ex. AL) in the sum of $20.00 drawn on the Guaranty Bank and Trust of Gatesville, Texas. He compared the signature on the check with the signature of accused's ASO card and accused showed him his name on War Department Orders granting him a leave, after which he approved the check. According to his records which are required to be kept as part of the regular hotel accounting procedure, he again approved a check for accused on 6 October 1944 in the sum of $20.00 (Ex. AM), and again approved a check for accused on 9 October 1944 in the sum of $25.00 (Ex. AN). Both of these checks were drawn on the Guaranty Bank and Trust Company of Gatesville, Texas. He has no personal recollection of the last two checks (R. 40). Mrs. Leroy Curtis, Cashier of the Texas Hotel testified and identified the checks referred to by the Assistant Manager, Mr. English, and stated that on 13 October 1944, each of the checks was returned by the hotel's bank marked, "No Account", and that all of the checks were paid by money order on 18 December 1944 (R. 42). The identification of accused's handwriting on the checks by Mr. John Patterson, Cashier of Guaranty Bank

and Trust, Gatesville, Texas (R. 61), the admission of the accused that he owed the Texas Hotel $55.00 on three items (R. 89) and the payment of these checks by Captain Conlin for the accused, establish that the accused is the person who issued the checks and that he received value therefor.

Specification 13 of Charge II

Mr. Oscar Vogel, Vice President, Continental National Bank, Fort Worth, Texas, testified that on 7 October 1944, a man dressed as an officer presented him a draft in the sum of $25.00 (Ex. AP) drawn on the Guaranty Bank and Trust Company of Gatesville, Texas, signed by Eugene B. Morris, First Lieutenant. This lieutenant stated that he was stationed at McCloskey General Hospital, and that he had come to Fort Worth and was without funds, and requested that he OK the check so that the tellers would cash it. He approved the check and payment was refused by the drawee bank. The identification of the accused's signature on the check by the cashier of the Guaranty Bank and Trust Company of Gatesville, Texas (R. 61), the admission of accused that he owed the Continental National Bank $25.00 (R. 89) and the payment for the accused of this account (R. 89), establish that the accused was the maker of the check and received cash therefor.

Specification 15 of Charge II

Don E. Lydick, Union Bank and Trust Company, Fort Worth, Texas, testified that on 9 October 1944 accused presented himself at his desk in the bank and requested him to approve his personal check for $20 drawn on the Guaranty Bank and Trust Co., Gatesville, Texas. Upon satisfying himself as to accused's identity upon accused's credentials the witness approved the check and caused it to be cashed. The teller gave the accused $20 in cash in exchange for the check. When sent through legal channels for collection it was returned unpaid. The witness wrote several letters endeavoring to collect the check and received on 20 December 1944 full payment from Captain Henry T. Conlin representing the accused (R. 47-48; Exs. AE, AF, AG, AH).

Specification 16 of Charge II:

Mr. T. N. Hostetter testified that he was assistant manager of the Rice Hotel in Houston, Texas, on 10 October 1944 when the accused came to his desk in the lobby of the hotel and asked him to cash for him his personal check for $20. The witness approved the check and the cashier, in his presence, gave the accused $20 in exchange for the check. The check was drawn on the Guaranty Bank and Trust Company, Gatesville, Texas, and when presented for payment was returned marked "no account" (R. 49-50, Ex. AS).

Robert L. Lynch, general cashier for the Rice Hotel, testified that accused's check that was cashed by the hotel on 10 October 1944 was

deposited for collection and returned unpaid by the drawee bank (R. 51; Ex. AT). Mrs. Charles R. Morgan, the credit manager for the hotel testified that she made several demands for the payment of the check and on 18 December 1944 received $20 in payment from Captain Conlin representing the accused (R. 52; Exs. AU, AV).

Specification 17 of Charge II

Mr. Henry J. Freer testified that he was the assistant cashier of the Second National Bank of Houston, Texas, on 11 October 1944 when accused came into the bank and the witness approved the accused's check in the sum of $25 drawn on the Guaranty Bank and Trust Company of Gatesville, Texas. Accused thereupon cashed the check in the bank. The check was put through the usual banking channels for collection and returned marked "no account" by the drawee bank. Demand was made for payment and on 15 December 1944 payment in the sum of $25 was received from Captain Conlin representing the accused. The amount of the check thus cashed was $25 (R. 53-54; Exs. AW, AX).

Specification 18 of Charge II

Mr. Daniel J. Evans, Vice President, City National Bank, Houston, Texas, testified that on 11 October 1944, accused asked him to OK a draft (Ex. AZ) for $25.00 drawn on the Guaranty Bank and Trust Company of Gatesville, Texas. The picture on his AGO card compared favorably with accused, and he OK'd the draft by placing his initial on the corner. The check was then cleared through the usual banking channels and was returned by the payee bank marked, "No Account" on or about 24 October 1944. The fact that accused admitted owing the City National Bank $25.00 and caused that amount to be paid to the bank (R. 89) establishes the facts that accused issued the check and received value therefor.

Specification 19 of Charge II

J. P. Charlton, owner and operator of South Side Drug Store, Temple, Texas, testified that on 13 October 1944 one of his employees in his store cashed a check (Pros. Ex. BB) dated that date, drawn on the Guaranty Bank and Trust, Gatesville, Texas, in the sum of $15, made by First Lieutenant Eugene B. Morris, which when deposited was returned marked "no account". On 31 October he wrote to the accused and received no reply. In December 1944 he received payment in full from Captain Henry T. Conlin acting for the accused (R. 57).

The account of the accused with the Guaranty Bank and Trust Company of Gatesville, Texas, the bank upon which all of the checks were drawn showed the following balance on deposit on the dates pertinent to the issues involved:

Date	Balance
1944	
18 July	$8.00
12 Aug.	2.41
13 Aug.	2.41
15 Aug.	2.41
8 Sept.	.20
11 Sept.	.20

On and after 16 September 1944 the account was closed and no funds of the accused were on deposit with the bank (R. 62-68).

4. For the Defense

Captain Henry T. Conlin, FA, TD RTC, North Camp, Camp Hood, Texas, Legal Assistance Officer, testified that early in November 1944 accused came to him for assistance in arranging his finances; that accused had some cash and all of his outstanding obligations were paid off except for a few current items and that his financial condition is very good at the present time (R. 86). Accused acknowledged being indebted to Private Raymond E. Moore (R. 88) and also acknowledged owing all the amounts set forth in Specifications 2 through 19, Charge II, and all of these items were paid in the middle of December (R. 88, 89).

Colonel Joseph J. Fraser, Headquarters, TD, RTC, Lieutenant Colonel Emory A. Dunnam, Headquarters, TD RTC, and Major Horace M. Shirley, TD ORP, TD RTC, all testified that they knew accused as an officer, and that they considered his work excellent, particularly as an instructor in map reading and radio voice and as an inspector of police and barracks. His reputation as an officer was also excellent (R. 75-82).

The accused having been duly advised of his rights as a witness elected to make a sworn statement (R. 90). He testified that he had been in the Army three years and eleven months and graduated from the Tank Destroyer Officer Candidate School on January 21, 1943 (R. 90). While he was an enlisted man he was married. His wife had previously been married and had a child by that marriage (R. 91). He had a daughter from his marriage (R. 91). Subsequently he discovered that his wife's first child was not the child of her former husband and since that time he had not lived with her (R. 91). He made several

attempts to obtain a divorce from her but was unsuccessful (R. 92). His daughter has been adopted by his parents and is with them at this time (R. 96). He made many efforts to borrow money so as to straighten out his financial affairs but was unsuccessful (R. 93, 99, 100, 102). As a result of his family and financial difficulties, he became very depressed, had trouble sleeping, suffered from constant headaches, and finally went to McCloskey Hospital in August 1944 and was discharged from the hospital 20 October 1944 (R. 100, 101).

Report of Disposition Board, McCloskey General Hospital, dated 27 September 1944 (Ex. 9), stated that it is the opinion of the board that accused is unfit for any type of duty by reason of psychoneurosis, and recommends that he appear before an Army Retiring Board for action (R. 104).

Disposition Board Proceedings, McCloskey General Hospital, 16 October 1944, (Ex. 10) states that accused is physically fit for transfer back to his organization for the purpose of receiving such disciplinary action as is deemed necessary (R. 106).

The report of the Neuropsychiatric Examination at McCloskey General Hospital dated 14 October 1944 (Ex. 7), states that the accused was at the time of the offenses charged so free from mental defect, disease or derangement as to be able concerning the acts charged, both to distinguish right from wrong and to adhere to the right, and that he is sufficiently sane to intelligently conduct and co-operate in his defense.

5. Discussion

a. Specification 1 of Charge II

The evidence clearly shows beyond any doubt that the accused while an officer of the Army of the United States borrowed $20 from an enlisted man at the time and place alleged in Specification 1 of Charge II and failed to repay it within the time agreed. The borrowing of money by an officer from an enlisted man has long been recognized as a violation of Article of War 96 as such an act is prejudicial to good order and military discipline. CM 233817, 20 B.R. 149; CM 272462, Ezell; CM 272588, McGovern.

The finding of guilty of this Specification and of the Charge should therefore be sustained.

b. Specification 2 to 19 inclusive of Charge II

With reference to the remaining Specifications the evidence clearly establishes that the accused made each check described in the Specifications and did on the dates and at the places alleged therein utter

or negotiate them to the persons, firms or corporations therein named and in exchange receive the face amount of each check in cash, except in the one instance, when he received services. It was also shown that the checks were presented to the bank upon which they were drawn through banking channels and payment was refused, and the checks returned unpaid because the accused failed to have on deposit with the drawee bank sufficient money to pay any of the checks. In view of the lack of funds on deposit with the drawee bank and the repeated issuance of checks on the depleted or closed account the court was warranted in drawing the inference that the accused knew that he did not have and did not intend to have sufficient funds on deposit with the drawee bank for the payment of the checks and that he therefore fraudulently obtained the money or the services that he did obtain by means of his worthless checks. All of the elements of the offenses charged were therefore clearly shown beyond any doubt and without contradiction. We have no difficulty in reaching the conclusion that findings of guilty of these Specifications should be sustained. The giving of worthless checks under the circumstances related constitutes a violation in each instance of the 96th Article of War. Such conduct on the part of an officer brings discredit upon the military service (CM 249006, 32 BR 5; CM 262189, Amidei; CM 273874, Miller; CM 270910, Persinger).

6. War Department records show the accused to be 26 years of age, married and the father of one child. He attended senior high school for 2 years and for 4 years thereafter was employed as a clerk. He was inducted into the service on 17 March 1941, attended Army Administration School 13 weeks, and performed clerical work thereafter until sent to OCS at Camp Hood, Texas on 24 October 1942. He was commissioned second lieutenant, Army of the United States, on 21 January 1943. On 25 May 1943 he was promoted to first lieutenant. On 28 November 1944 he tendered his resignation for the good of the service in lieu of trial by court-martial. Shortly thereafter he submitted with his resignation proof that he had paid in full all of the obligations made the basis of the charge and the specifications above. His offer of resignation was officially refused.

7. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon a conviction of Article of War 96.

Earle Stephens, Judge Advocate.

Hermann Schayer, Judge Advocate.

John R. Anderson, Judge Advocate.

SPJGK-CM 276755 1st Ind

Hq, ASF, JAGO, Washington 25, D. C. MAR 27 1945

TO: The Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Eugene B. Morris (O-1823333), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed and carried into execution.

3. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

3 Incls
1. Rec of trial
2. Drft ltr for sig S/W
3. Form of Action

(Sentence confirmed. G.C.M.O. 163, 9 May 1945)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGN-CM 276779

UNITED STATES	)	ARMY GROUND FORCES REPLACEMENT DEPOT NO. 1
v.	)	Trial by G.C.M., convened at Fort George G. Meade, Maryland, 7 March 1945. Dismissal and confinement for one (1) year.
Second Lieutenant HAROLD R. STUMP, JR. (0-1328536), Infantry.	)	

OPINION of the BOARD OF REVIEW
LIPSCOMB, O'CONNOR and MORGAN, Judge Advocates

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1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that Second Lieutenant Harold R. Stump, Jr, Company D, 9th Replacement Battalion, 3d Replacement Regiment (Inf), then well knowing that he had been included in orders for imminent transfer to a port of embarkation for overseas shipment, did, at Fort George G. Meade, Maryland, without proper leave, absent himself from his organization from about 0730, 22 February 1945, until he surrendered himself at Fort George G. Meade, Maryland, on or about 1600, 27 February 1945, and thereby missed his shipment which departed this Depot on or about 2200, 22 February 1945.

He pleaded not guilty to, and was found guilty of, both the Charge and the Specification thereunder. He was sentenced to be dismissed the service and to be confined at hard labor, at such place as the reviewing

authority might direct, for one year. The reviewing authority approved the sentence; designated the Midwestern Branch, United States Disciplinary Barracks, Fort Benjamin Harrison, Indiana, as the place of confinement; and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that the accused on 14 February 1945 joined Company D, 9th Battalion, 3rd Regiment, AGF Replacement Depot No. 1, at Fort George G. Meade, Maryland (R. 6). Six days later he was alerted and given a copy of Special Orders No. 51, which had been issued by the Headquarters of AGF Replacement Depot No. 1, and which read in part as follows:

> "6. Off and EM named on atchd lists, which are a part of this order, are reld from atchd unasgd orgn indicated, are trfd in gr from this sta, are asgd Shpmt Number GM-449 (a)-A (Excess Off Co A; Inf Co A B C; FA Btry A; Misc Co A), WP Camp Patrick Henry Va o/a 22 Feb 45 reporting to CG. EDCMR will be date of departure. Pers will use APO 15805 c/o Postmaster New York NY as mailing address until arrival at final destination" (R. 6-7, 10; Pros. Ex. A).

The accused's name appeared on page 36 of the attached lists (R. 7; Pros. Ex. B). He and the other officers designated were told, among other things, that they would leave sometime after 6:00 p.m. on 22 February 1945, and that the shipment was "destined to go to a P. of E." (R. 10).

Upon arriving at Fort Meade he had been given a processing memorandum which stated that:

> "3. A special VOCO Register is provided at 'D' Co. 9th Bn. Orderly room for the use of Replacement Officers.
> a. Any Replacement Officer temporarily leaving the Post for any purpose will sign this Register and give information required by it in full. Information will be printed and be legible" (R. 9; Pros. Ex. D).

This directive was supplemented by oral instructions (R. 8-9). Although the accused had been alerted and had not been given special permission to be absent "after duty hours began" on 21 February 1945, he on that day signed out on the register as of 1715 o'clock (R. 9; Pros. Ex. E). When the roll was called on 22 February 1945, he was not present. Repeated searches conducted throughout the day showed that he was neither in his quarters nor in the company area (R. 7-8). The following morning he was carried on the morning report "as duty to AWOL as of 0730" on 22 February 1945. He did not return to his organization until 27 February 1945 (R. 8; Pros. Ex. C).

4. After being apprised of his rights relative to testifying or remaining silent, the accused elected to make the following short unsworn statement:

> "I was inducted into the Army on March 17, 1944, that was last year, after I volunteered for induction, and I received my basic training at Fort Knox, Kentucky, appointed to the Infantry School, graduated from the Infantry School and served at Fort McClellan, Alabama, as platoon leader, for approximately two months. From there, on my form 66, I received a rating of excellent. I volunteered for overseas duty at Camp McClellan and was sent here to report the 17th of February. After being processed and so forth, I did leave my post the 21st of February, but I did not do it in order to miss my shipment. It isn't one of my usual characteristics to go absent without leave. I had been drinking--that's no excuse, of course--but that's the only reason I know to account for my actions. As soon as I realized what I was doing, why, I reported back and surrendered myself to the company commander. If it's at all possible, in arriving at your decision, after the offense I have committed, I would certainly like a chance to redeem myself" (R. 11).

No evidence was adduced by the defense.

5. The Specification of the Charge alleges that the accused

> "* * * then well knowing that he had been included in orders for imminent transfer to a port of embarkation for overseas shipment, did, * * * without proper leave, absent himself from his organization from about 0730, 22 February 1945, until he surrendered himself * * * on or about 1600, 27 February 1945, and thereby missed his shipment * * *".

This offense was laid under Article of War 96.

Although he had been alerted and specifically instructed that he was to be included in an overseas shipment scheduled to depart on 22 February 1945, the accused absented himself without leave on that day and did not return to duty until five days later. The only explanation offered for this serious dereliction was indulgence in alcohol. This was, of course, an aggravating rather than an extenuating circumstance, particularly in view of the accused's alerted status. The Specification has been proved beyond a reasonable doubt.

6. The accused, who is married and the father of two children, is about 27 years old. After attending Marshall College for one and

one half years, he was employed by the Inland Gas Corporation and the Kentucky & Ohio Gas Company as a crew manager from March of 1933 to September of 1942, by the Carbide & Carbon Chemical Company in an undisclosed capacity from July of 1942 to September of 1943, and by the Pennsylvania Railroad as an assistant trainmaster from January of 1944 to March of 1944. From September of 1943 to January of 1944 he was self-employed as the owner of a dairy. After enlisted service from 18 March 1944 to 4 December 1944, he was commissioned as a second lieutenant on 5 December 1944. He has been on active duty since this last date.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

Abner E. Lifsconb, Judge Advocate.

Robert J. Clemon, Judge Advocate.

Samuel C. Morgan, Judge Advocate.

SPJGN-CM 276779 1st Ind

Hq ASF, JAGO, Washington 25, D. C.

MAR 2 1945

TO: The Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Harold R. Stump, Jr. (O-1328536), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the confinement imposed be remitted, and that the sentence as thus modified be ordered executed.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation, should such action meet with approval.

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

3 Incls
1. Rec of trial
2. Drft ltr for sig S/W
3. Form of Action

(Sentence confirmed but confinement remitted. G.C.M.O. 209, 11 Jun 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGQ - CM 276847

UNITED STATES	HEADQUARTERS SHIPMENT NUMBER 0288 CAMP MYLES STANDISH, MASSACHUSETTS
v.	
Captain CHARLES M. PONSLER (01306750), Infantry.	Trial by G.C.M., convened at Camp Myles Standish, Massachusetts, 16-17 February 1945. Dismissal.

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OPINION of the BOARD OF REVIEW
ANDREWS, FREDERICK and BIERER, Judge Advocates

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1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 93rd Article of War.
(Finding of not guilty.)

Specification 1: (Finding of not guilty.)

Specification 2: (Finding of not guilty.)

CHARGE II: Violation of the 95th Article of War.

Specification 1: (Motion for finding of not guilty sustained.)

Specification 2: In that Captain Charles M Ponsler, Company D, 0288-G, Camp Myles Standish, Massachusetts, did, while on Train Main Number 1509 enroute to destination, on or about 5 February 1945, wrongfully gamble with enlisted men, namely, Sergeant Hugh M Lee, Sergeant Robert F Randolph, Technician Fifth Grade Edward I Bernstein, and Private First Class George M McKee, all of Company D 0288-G.

Specification 3: In that Captain Charles M Ponsler, Company D, 0288-G, Camp Myles Standish, Massachusetts, did, while on Train Main Number 1509 enroute to destination, on or about 5 February 1945, wrongfully drink intoxicating liquor with enlisted men, namely, Sergeant Hugh M Lee, Sergeant Robert F Randolph, Technician Fifth Grade Edward I Bernstein, and Private First Class George M McKee, all of Company D 0288-G.

He pleaded not guilty to all Charges and Specifications. A motion for a finding of not guilty as to Specification 1, Charge II, was granted (R. 94). He was found not guilty of Charge I and its Specifications, and guilty of Charge II and Specifications 2 and 3 thereof. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that on the night of 5 February 1945 Company D, Shipment Number 0288-G, was moving by troop train from California to Camp Myles Standish, Massachusetts. The accused was company commander of Company D and was on board the train. At some time prior to 11:30 p.m. the accused entered a latrine in one of the coaches where some enlisted men were gambling, and engaged in a poker game with Private First Class George M. McKee, Sergeant Hugh M. Lee, Technician Fifth Grade Edward I. Bernstein and Sergeant Robert F. Randolph, all of whom were members of his command. The accused played hands and made bets in the poker game. The limits were twenty-five and fifty cents, and the game was being played "for keeps." No other officer participated in the game, but other enlisted men played while accused was there (R. 15-33, 111). Private First Class McKee and Sergeant Lee saw the accused drink from a pint bottle of whiskey during the game (R. 17-18, 24). Lee also saw an enlisted man drink from the bottle (R. 24). McKee testified that accused offered the bottle to the other players but that none of the others drank (R. 18). Bernstein and Randolph did not see any whiskey consumed during the game (R. 27, 31). McKee, Lee and Bernstein each thought that accused acted normally or "all right" during the game (R. 19, 22, 28).

4. The accused, after having his rights explained to him, elected to testify under oath (R. 98). He had played poker with other officers "off and on" throughout the day of 5 February until 8:00 or 8:30 p.m. that night. He took a total of three "sulpha drug" tablets during the day, one at 9:00 a.m., one at noon and another about 6:00 p.m. He began drinking whiskey about 8:30 p.m., and consumed about a pint during the night from a "four-fifths bottle". On another occasion he had used liquor and sulpha drugs together and the morning after a party he had been unable to remember several things that happened during the night before. After consuming the whiskey, accused said that "To the best of my recollection, I played poker with some noncommissioned officers in Car No. 7; later on in the night, sometime between 12:30 and 1:00 o'clock, I started back to my car." He remembered making bets in the poker game, and that the limit was "25 cents and 50 cents." There were no other officers in the game. He did not recall how long he participated in the game. He did not recall having a pint of whiskey at any time, and knew he had only a "fifth" when he boarded the train. He did not recall drinking any whiskey during the poker game (R. 99-104).

Private Joseph B. Zerhut testified for the defense that he played in the poker game with accused and the other enlisted men, and that during the game accused "acted sort of odd" and not at all "like his usual self." The witness did not see any of the players take a drink of liquor, although "there was a pint bottle in the game" (R. 110-113).

It was stipulated that Private Ancel Teal, if present in court to testify, would in substance corroborate the testimony of Private Zerhut (R. 113).

First Lieutenant Morris R. Ferguson, Battalion Surgeon, testified that while on the train he had prescribed and given to the accused nine sulphadiazene tablets, which were to have been crushed and used as a gargle, but accused had later told the witness of taking three of the tablets by mouth. It was "theoretically possible" that the consumption of three such tablets and more than a pint of whiskey by the accused would have resulted in an inability to remember what transpired during a period of time (R. 95-98).

It was stipulated "that the entry on the WD AGO Form 66-1 of the accused pertaining to his manner of performance of duty for the period July 1, 1944 to December 31, 1944, both dates inclusive, is 'Excellent'" (R. 94-95).

Major Edwin K. Aasen testified that accused has "done an excellent job" while commanding two companies of troops under the command of the witness since June 1944. He also testified that accused

> "has always conducted himself in a manner that has been, so far as I know, above reproach. * * * I have always respected and admired him. He always had a high grade company as far as morale, knowledge and training is concerned. He took one of my companies down there which was a little weak you might say and brought them up on an even par with the other two rifle companies. He can train men; I am confident of that" (R. 7-8).

Captain Colin Stokes testified that he had served under accused while the latter was a company commander and later an assistant battalion commander, and still later both had served as company commanders in the same battalion. The witness "would rate him between Excellent and Superior" as a soldier and an officer, and also would rate him "as a gentleman. * * * As a Company Commander and commander of troops, he is as good as any Company Commander I have ever served under" (R. 9-10).

5. The evidence is clear and uncontroverted that the accused, a captain, gambled for money with four enlisted men of his command

while in a latrine on a troop train travelling to Camp Myles Standish, Massachusetts, on the night of 5 February 1945, as alleged in Specification 2 of Charge II. Indeed, accused admits his participation in the poker game with the enlisted men, but denies any recollection of drinking intoxicating liquor with enlisted men as alleged in Specification 3 of Charge II. Four witnesses who participated in the poker game failed actually to see the accused drink any liquor. Two of the players, however, testified positively that they saw accused drink from a pint bottle of whiskey during the poker game, in the presence of the enlisted players, and one of them stated that an enlisted man also drank from accused's bottle. In view of accused's admission that he had consumed a pint of whiskey and three sulpha drug tablets prior to engaging in the poker game, and in view of the other evidence relative to the effects of both upon accused, it is neither surprising nor unreasonable that he would not recall drinking any liquor during the game. The evidence is sufficient to warrant a finding of guilty of Specification 3 of Charge II.

The evidence is not sufficient, however, to show that the actions of accused as alleged and proved under either Specification 2 or 3 constituted a violation of Article of War 95. Both the gambling and the drinking occurred in a private place at nighttime, in the presence of only military personnel, and apparently while none of the players was engaged in any military duties. No disorderly or ungentlemanly conduct is shown to have taken place. Under such circumstances the conduct of accused was prejudicial to good order and military discipline, but it was not of such aggravated character as to compromise his character and standing as a gentleman. The offenses of which he was found guilty are in violation of Article of War 96, and not of Article of War 95 (CM 252710, Bates, 34 BR 147; CM 252961, Martin, 34 BR 223).

6. War Department records show that accused is 27 years of age, is single, and is a native of the State of Illinois. He graduated from high school in 1935 and thereafter worked as a farm laborer on his father's farm for four years. From 1939 to 1940 he worked as a classified laborer for a pipeline construction company. He served as an enlisted man in the Infantry from August 1941 to 4 January 1943, when he was commissioned a second lieutenant in the Army of the United States upon graduation from The Infantry School at Fort Benning, Georgia. He was promoted to the grade of first lieutenant on 8 July 1943, and to the grade of captain on 3 February 1944.

7. The court was legally constituted. Except as noted, no errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of Charge II and Specifications 2 and 3 thereof

as finds the accused guilty of those Specifications in violation of Article of War 96, and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

Fletcher R. Andrews, Judge Advocate

Herbert B. Frederick, Judge Advocate

_____, Judge Advocate

SPJGQ-CM 276847 1st Ind

Hq ASF, JAGO, Washington 25, D. C.

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Charles M. Ponsler (O-1306750), Infantry.

2. Upon trial by general court-martial this officer was found guilty of one specification alleging gambling with four enlisted men (Spec. 2, Charge II), and another specification alleging the drinking of intoxicating liquor with four enlisted men (Spec. 3, Charge II), each in violation of Article of War 95. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of Charge II and Specifications 2 and 3 thereof as finds the accused guilty of those specifications in violation of Article of War 96, and legally sufficient to support the sentence and to warrant confirmation thereof. I concur in that opinion.

During the night of February 5, 1945, while a company commanded by the accused was moving by troop train between California and Massachusetts, the accused entered a latrine in one of the coaches where some enlisted men were gambling, and engaged in a poker game with four enlisted men, all of whom were members of his command. No other officers participated in the game, but other enlisted men played while accused was there. During the poker game, the accused drank from a pint bottle of whiskey and offered the bottle to the other players. One enlisted man drank from the bottle. The accused, in his testimony, admitted playing poker with some noncommissioned officers, but did not recall drinking any whiskey during the game. He admitted, however, that he drank about a pint of whiskey after 8:30 p.m. on the night of 5 February and that he had taken three "sulpha drug" tablets during the day, which combination on a previous occasion had caused him to have a lapse of memory.

Attached to the record of trial is a letter dated May 23, 1945, with inclosures, from the Camp Judge Advocate, Camp Myles Standish, Massachusetts, which letter states in substance that on Sunday, 20 May 1945, while Post Engineer Duty Officer, the accused and an enlisted member of the Women's Army Corps drank liquor together about 10:00 p.m. at the Post Engineer Office, the accused's place of duty. Following

this, the accused, wrongfully and without authority, left his place of duty at that office and drove the enlisted woman to his quarters in an officers' barracks, where he had no right to take her, and where she had no right to be. They were found there about midnight. At the time they were discovered, accused was in a bed in one room of his two-room quarters. In the other room two single beds had been pushed together, and the woman was in one of these with the bedclothes over her head and body, evidently to prevent discovery. She had on only her underclothes, and accused was in a "state of undress." The enlisted WAC admitted having engaged in sexual intercourse with accused in his quarters shortly before they were discovered. Accused denied the intercourse but admitted bringing the woman to his quarters, stating that he intended to keep her there only a few minutes and then drive her to her organization, but that he was very tired, fell asleep, and did not awake until the entrance of the officers who discovered them.

The behavior of the accused shows a total lack of appreciation of, and respect for, the duties and responsibilities of an officer of the Army. I recommend that the sentence be confirmed and carried into execution.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

3 Incls
1-Record of trial
2-Ltr. dated 23/5/45
fr. Camp Judge Advocate,
Cp. Myles Standish, Mass.
3-Form of action

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed. G.C.M.O. 309, 7 Jul 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGH-CM 276866

10 APR 1945

UNITED STATES	)	ARMY AIR FORCES
	)	EASTERN FLYING TRAINING COMMAND
v.	)	
	)	Trial by G.C.M., convened at
Captain ALVIN M. WALKER	)	Maxwell Field, Alabama,
(0-427059), Air Corps.	)	21 February 1945. Dismissal.

OPINION of the BOARD OF REVIEW
TAPPY, GAMBRELL and TREVETHAN, Judge Advocates

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1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 94th Article of War

Specification 1: In that Captain Alvin M. Walker, Air Corps, Section "B", 2132nd AAF Base Unit, Maxwell Field, Alabama, then Second Lieutenant Alvin M. Walker, Air Corps, did, at Midland Army Air Field, Midland, Texas, on or about 15 April 1942, for the purpose of obtaining the payment of a claim against the United States, present to the Finance Officer, Midland Army Air Field, Midland, Texas, an Officer of the United States, duly authorized to approve, pay, and allow such claims, a certain writing for approval and payment, to wit: War Department Form 336, Revised, Pay and Allowance Account, for the month of April 1942, which said writing as he, the said Captain Alvin M. Walker, Air Corps, then Second Lieutenand Alvin M. Walker, Air Corps, then knew contained a statement that the sum of One Hundred Eighty-Eight Dollars and Thirteen Cents ($188.13) was due him, which statement was false and fraudulent, in that said statement omitted as a debit a Class "E" Allotment in the sum of One Hundred Dollars ($100.00), payable to the said Captain Alvin M. Walker's, then Second Lieutenant Alvin M. Walker's account at the National Bank of Fort Sam Houston, San Antonio, Texas, and was then known by the said Captain Alvin M. Walker, then Second Lieutenant Alvin M. Walker, to be false and fraudulent.

Specification 2: Same allegations as Specification 1 except offense committed on or about 15 May 1942 and pay voucher covered month of May 1942 for the amount of $199.40.

Specification 3: Same allegations as Specification 1 except offense committed on or about 15 June 1942 and pay voucher covered month of June 1942 for the amount of $296.30.

Specification 4: Same allegations as Specification 1 except offense committed on or about 15 July 1942 and pay voucher covered month of July 1942 for the amount of $285.

Specification 5: Same allegations as Specification 1 except offense committed on or about 15 August 1942 and pay voucher covered month of August 1942 for the amount of $342.33.

Specification 6: Same allegations as Specification 1 except offense committed on or about 15 September 1942 and pay voucher covered month of September 1942 for the amount of $324.30.

Specification 7: Same allegations as Specification 1 except offense committed on or about 15 October 1942 and pay voucher covered month of October 1942 for the amount of $325.

Specification 8: Same allegations as Specification 1 except offense committed on or about 15 November 1942 and pay voucher covered month of November 1942 for the amount of $245.55.

Specification 9: Same allegations as Specification 1 except offense committed on or about 15 December 1942 and pay voucher covered month of December 1942 for the amount of $246.25.

Specification 10: Same allegations as Specification 1 except offense committed on or about 15 January 1943 and pay voucher covered month of January 1943 for the amount of $246.25.

Specification 11: Same allegations as Specification 1 except pay voucher in the amount of $254.15, submitted to Finance Officer, Fifth Service Command, Columbus, Ohio, on or about 15 February 1943 covering month of February 1943.

Specification 12: Same allegations as Specification 11 except offense committed on or about 15 March 1943 and pay voucher covered month of March 1943 for the amount of $246.25.

Specification 13: Same allegations as Specification 11 except offense committed on or about 15 April 1943 and pay voucher covered month of April 1943 for the amount of $245.55.

Specification 14: Same allegations as Specification 11 except offense committed on or about 15 May 1943 and pay voucher covered month of May 1943 for the amount of $246.25.

Specification 15: Same allegations as Specification 11 except offense committed on or about 15 June 1943 and pay voucher covered month of June 1943 for the amount of $245.55.

Specification 16: Same allegations as Specification 11 except offense committed on or about 15 July 1943 and pay voucher covered month of July 1943 for the amount of $246.25.

Specification 17: Same allegations as Specification 11 except offense committed on or about 15 August 1943 and pay voucher covered month of August 1943 for the amount of $246.25.

Specification 18: Same allegations as Specification 11 except offense committed on or about 15 September 1943 and pay voucher covered month of September 1943 for the amount of $245.55.

Specification 19: Same allegations as Specification 11 except offense committed on or about 15 October 1943 and pay voucher covered month of October 1943 for the amount of $246.25.

Specification 20: Same allegations as Specification 11 except offense committed on or about 15 November 1943 and pay voucher covered month of November 1943 for the amount of $327.21.

Specification 21: Same allegations as Specification 11 except offense committed on or about 15 December 1943 and pay voucher covered month of December 1943 for the amount of $296.25.

Specification 22: Same allegations as Specification 11 except offense committed on or about 15 January 1944 and pay voucher covered month of January 1944 for the amount of $296.25.

Specification 23: Same allegations as Specification 11 except offense committed on or about 15 February 1944 and pay voucher covered month of February 1944 for the amount of $294.85.

Specification 24: Same allegations as Specification 11 except offense committed on or about 15 March 1944, pay voucher covered month of March 1944 for the amount of $296.25, and Class E allotment of $100 per month was deposited in accused's account at Huntington National Bank, Columbus, Ohio.

Specification 25: Same allegations as Specification 11 except offense committed on or about 15 April 1944, pay voucher covered month of April 1944 for the amount of $295.55, and Class E allotment of $100 per month was deposited in accused's account at Huntington National Bank, Columbus, Ohio.

Specification 26: Same allegations as Specification 11 except offense committed on or about 15 May 1944, pay voucher covered month of May 1944 for the amount of $351.75, and Class E allotment of $100 per month was deposited in accused's account at Huntington National Bank, Columbus, Ohio.

Specification 27: Same allegations as Specification 11 except offense committed on or about 15 June 1944, pay voucher covered month of June 1944 for the amount of $310.55, and Class E allotment of $100 per month was deposited in accused's account at Huntington National Bank, Columbus, Ohio.

He pleaded not guilty to the Charge and all Specifications. He was found guilty of the Charge and Specifications 1 through 23 and guilty of Specifications 24 through 27 with the exception of the words "Huntington National Bank, Columbus, Ohio" substituting therefor the words "National Bank of Fort Sam Houston, San Antonio, Texas," No evidence of any previous convictions was considered. He was sentenced to dismissal, total forfeitures and confinement for three years. The reviewing authority approved the sentence, remitted the confinement and forfeitures and forwarded the record of trial for action under Article of War 48.

3. The prosecution introduced by stipulation by and between it, the defense and the accused, the following evidence:

On 21 March 1942 accused submitted a "Financial Statement" to the National Bank of Fort Sam Houston, San Antonio, Texas, wherein in consideration of a bank loan made to him in the amount of $600, payable in 15 monthly installments of $40 each commencing 5 May 1942, accused certified that his monthly pay as a second lieutenant, including rental and subsistence allowances, was $239.40 and

"(b) That during the term of this loan I will maintain a checking account with the bank by having made a Class E allot-

ment of $100.00 per month to come to the bank for credit to such account and that I have sent the original W.D., A.G.O. Form No. 29 (Allotment Form) to The Finance Officer, U. S. Army, Washington, D. C." (R. 24, 25; Pros. Exs. N, O).

On 27 March 1942 there was received in the Office of Dependency Benefits a W.D., A.G.O. Form No. 29, dated 21 March 1942 and signed by "Lt. Alvin M. Walker", which authorized a Class E Allotment of the pay of Second Lieutenant Alvin M. Walker, O-427059, Air Corps Reserve, in the amount of $100 per month, commencing 1 April 1942 and payable to the National Bank of Fort Sam Houston, San Antonio, Texas (R. 14; Pros. Ex. A). Pursuant to this authorization the Office of Dependency Benefits issued allotment checks in the sum of $100 per month from May 1942 through July 1944 inclusive, payable to the National Bank of Fort Sam Houston, San Antonio, Texas, to be credited to the account of accused, and each such check was so credited and returned to the issuer (R. 16, 17, 20; Pros. Exs. C, D, F).

Accused signed and submitted War Department Form No. 336-Revised (pay voucher) for the months of April through July 1942 as a second lieutenant, and for the months of August 1942 through January 1943 as a first lieutenant, to the Finance Officer, Midland Army Air Field, Texas. His vouchers for the months of February 1943 through October 1943 as a first lieutenant, and for the months of November 1943 through June 1944 as a captain, were signed by him and submitted to the Finance Officer, Columbus, Ohio. Each of these vouchers contained the usual certification that the account submitted was "true and correct". The vouchers for the months of April 1942 through February 1944 contained a direction that the amount due thereon be placed to accused's credit with the National Bank of Fort Sam Houston, San Antonio, Texas, with the exception of the voucher for the month of November 1943 which was to be paid in cash. The remaining vouchers - March 1944 through June 1944 - contained a similar direction with respect to the "Huntington National Bank, Columbus, Ohio." On none of these vouchers did the accused reveal the existence of the Class E allotment or deduct from the amount he claimed for pay and allowances any sum for the allotment although the vouchers contained an item to be used for that purpose (R. 23; Pros. Exs. G, H, J-1 through J-10, K-1 through K-17). Accordingly, he claimed on these vouchers and there was deposited in his bank account, without any deduction for the Class E allotment, the following amounts for the following months, with the exception of September 1942 when he claimed $324.30 and was paid $324 (R. 17, 20, 22; Pros. Exs. D, G, H, I):

1942	Amount
April	$188.13
May	199.40
June	296.30
July	285.00
August	342.33
September	324.30
October	325.00
November	245.55
December	246.25

1943	Amount
January	$246.25
February	254.15
March	246.25
April	245.55
May	246.25
June	245.55
July	246.25
August	246.25
September	245.55
October	246.25
November	327.21
December	296.25
1944	
January	296.25
February	294.85
March	296.25
April	295.55
May	351.75
June	310.55

From April 1942 to July 1944, a total of sixteen bank statements relative to accused's account in the National Bank of Fort Sam Houston were mailed to accused at his last known address as shown on the bank's records and were not returned to the bank. It was the policy of this bank during the period 1 May 1942 through 5 October 1944 to mail to accused duplicate deposit slips on the occasion of the deposit of the allotment checks and so far as the records of the bank disclose the deposit slips were mailed to him at his last known address and were not returned to the bank (R. 18; Pros. Ex. E). The Office of Dependency Benefits was notified by an instrument dated 1 July 1944 and signed by accused that his Class E allotment of $100 per month, payable to the National Bank of Fort Sam Houston, San Antonio, Texas, was discontinued effective 31 July 1945.

4. Accused, after being warned of his rights, elected to testify under oath and he gave the following testimony: He was a graduate of Geneva College, Beaver Falls, Pennsylvania, and his account in the National Bank of Fort Sam Houston was the first bank account he ever had. At the time he borrowed money from the National Bank of Fort Sam Houston he failed to fill out the allotment form properly and he was supposed to obtain two correct copies from the bank and send one to the finance officer. However, he had no recollection of having received the forms from the bank or of filing them with the military authorities (R. 37-39). He did not remember signing the authorization for an allotment of $100 per month but he admitted that the signature appearing on the authorization was his signature (R. 47, 50). He remembered receiving bank statements approximately every month but he examined them only to the extent of adding the amount of his pay check for the current month to the amount shown in the "bottom right

hand corner" of the bank statement for the previous month. The total of these two figures indicated to him the amount he had available for the coming month. Once he detected that there was $100 item deposited to his account but he did not realize that this was the result of the allotment or that it was coming from the Office of Dependency Benefits. In fact, accused attributed the discrepancy to an error made by the bank because on three previous occasions they had made mistakes in reference to his account (R. 37-39, 43, 51; Def. Exs. 9-a, 9-b, 9-c). Apparently these "mistakes" were committed by the bank when it dishonored several checks of accused because the balance in his account was insufficient to pay them. However, receipt of accused's pay check shortly thereafter cleared up the bank's "errors" (R. 43, 46).

The first time accused realized that he was receiving $100 per month over the correct amount of his pay was when he received a letter from the Office of Dependency Benefits in May 1944 (R. 26, 27). He immediately communicated with Captain Waldecker, Post Finance Officer, and Colonel Flint, Director of Finance, Fifth Service Command, and wrote his bank for a transcript of his account. Three weeks later he received a statement which showed the deposits made to his account but not the withdrawals therefrom. He conferred with Colonel Flint who told him that it would have to be repaid. Accused informed Captain Waldecker about this and the latter prepared a 4th indorsement to the letter from the Office of Dependency Benefits requesting that accused's pay be withheld to the extent of $100 per month until full restitution had been made (R. 27, 28; Def. Ex. 1). Finally in January 1945, after conferences with finance officers, correspondence with the Office of Dependency Benefits and an investigation by the Inspector General's Department, accused was advised by the fiscal authorities that he must repay the amount he had received under his allotment and he thereafter promptly sold his automobile, cashed some War Bonds and made repayment thereof (R. 32-34).

On cross-examination accused admitted voluntarily making and signing a statement before Major W. J. Brian, the investigating officer, after his rights had been fully explained to him (R. 46, 59). When confronted with the statement accused admitted that he had learned of the regular overpayment of $100 per month in February 1943, rather than June 1944 as he previously testified, after checking over a complete bank statement sent him at his request and several of his previous monthly bank statements, but he did not learn the source from which these excess funds were coming. He had requested the complete statement from the bank because "there was a difference in my balance and their balance on their regular statement. I thought that they were mistaken about my deposit" (R. 49, 57; Pros. Ex. P). He thought the excess deposit was a mistake which the bank would eventually correct so he did nothing about it (R. 58). Accused had signed all of his pay vouchers which were made up for him by the finance officer (R. 49). He purchased an automobile in the fall of 1941 on which he made monthly payments of $56.30 until the purchase price was paid in full in May 1943 (R. 52, 53).

Colonel Calvin E. Peeler testified that while accused served under him as an instructor on B-29 type of aircraft he performed his work in a superior manner and was rated considerably above the average instructor (R. 60, 61). Lieutenant Colonel C. L. Abercrombie, Jr., also testified that accused performed his military duties in a superior manner and both he and Captain Lowe L. Mitchell testified that accused's general reputation for truth and veracity was good (R. 62, 64).

5. In rebuttal the prosecution called Major William J. Brian, the investigating officer, who testified that, after accused had been fully acquainted with his rights, he answered certain questions propounded to him from which a statement was prepared and signed by accused on or about 12 January 1945 (R. 64, 65). Accused's statement contains the following pertinent matters. When he originally negotiated the loan of $600 from the National Bank of Fort Sam Houston in March 1942, he understood that the allotment of $100 per month would only become operative if he removed his account from the creditor bank. While at Midland Army Air Field, Midland, Texas, from April 1942 to February 1943, accused received his bank statements approximately every month and, although they reflected monthly deposits of both his full pay and an additional $100 per month, he never examined them very closely. In February 1943, about the time of his transfer to Lockbourne Army Air Base, Columbus, Ohio, he finally realized that an additional sum of $100 was being deposited to his account each month. He thought the entries on his statements reflecting these monthly deposits of $100 were the result of errors made by the bank which eventually would be corrected. He took no steps to consult the bank about the matter and continued to draw against the full amounts deposited to his account. In May 1944, accused received a letter from the Office of Dependency Benefits stating that he had been paid an allotment since April 1942, and then he realized for the first time the source of the extra $100 per month that had been deposited to his account. From April 1942 he had continuously filed monthly pay vouchers for, and had received, the full amount of his pay and had not entered any statement about a Class E allotment on his vouchers because he "had not known or had not realized" that he had such an allotment. After he received the letter from the Office of Dependency Benefits advising him of the allotment deposits made to his Account, he consulted with two finance officers as to the method of repaying the sums improperly deposited to his account and finally was directed by the fiscal office promptly to repay the full amount thereof which he did. Accused admitted he was guilty of negligence in accepting and drawing on these monthly deposits of $100 without ascertaining their source but denied that he ever intended to defraud the United States in any manner whatsoever (Pros. Ex. P).

6. Accused was charged with filing 27 false and fraudulent monthly pay vouchers for the period from April 1942 to June 1944 inclusive, in that in each one he claimed his full month's pay without reciting that he had in existence a Class E allotment of $100 per month which he should have entered as a debit on his monthly vouchers. The evidence conclusively establishes that accused did make out pay vouchers for, and did receive,

his full month's pay for each month from April 1942 to June 1944 inclusive, and also received on his Class E allotment an additional $100 per month over that period of time which was regularly sent to his bank for deposit by the Office of Dependency Benefits. He did not recite the existence of the allotment in the appropriate blank provided therefor on each of the vouchers. The authorization for the Class E allotment bore accused's signature and had been signed by him when he negotiated a bank loan in April 1942 to insure the bank of the monthly payments to be made on the loan. At least in February 1943, accused was aware of the fact that an extra $100 per month was being deposited to his account but he claimed he made no effort to find out the source from whence it came. He received some 16 bank statements covering this period which reflected all of the monthly deposits of his pay and the additional $100.

Accused sought to excuse his conduct on the grounds that he did not know the extra $100 per month was coming from the Office of Dependency Benefits because he believed his Class E allotment would only become operative if before his bank loan was repaid he should withdraw his account from the creditor bank. He further stated that he believed the additional monthly deposits resulted from an error made by the bank which it would eventually correct although in the meantime he was content to spend the windfall without taking steps to correct the "error."

It is quite apparent from the prosecution's evidence that accused signed and filed these 27 false pay vouchers. Furthermore, in view of the evidence as to accused's execution of an authorization for a Class E allotment of $100 per month and the regular deposit of that amount to his account as reflected on his 16 bank statements all of which were received by him, the court was amply warranted in concluding that accused realized his allotment was operative at the time he prepared and filed his pay vouchers from which he omitted any mention of the allotment and that, accordingly, he filed these vouchers motivated by an intent to defraud. Accused's testimony that he did not realize his allotment was operative during these months is too unreasonable to induce belief in view of the clear unambiguous language contained in the authorization for the allotment executed by him.

Accused's fraudulent intent is equally established by his own testimony. He admitted that in February 1943, after examining bank statements received by him, he realized a windfall of $100 a month was finding its way into his bank account. Although knowing he was not entitled to it, he was content to draw against each monthly deposit without making any inquiry of the bank to determine the source thereof. An intent to defraud exists when a person willfully appropriates to his own use funds to which he knows he is not entitled even though they be placed at his disposal through error. In such an event he is charged at least with the duty of leaving the funds intact if not with the duty of exercising reasonable diligence to correct the error.

From all of the evidence it is our opinion that the court was fully warranted in concluding that accused signed and filed each of the

alleged monthly pay vouchers knowing them to be false and fraudulent in that he claimed his full month's pay on each voucher and failed to recite thereon the existence of a Class E allotment of $100 per month, he thereafter accepting the overpayment of $100 per month for some 27 months and appropriating it to his own use.

7. Accused is 27 years of age. War Department records indicate that he graduated from Geneva College, Beaver Falls, Pennsylvania, in 1939 and was employed by a department store as buyer and retail salesman of men's merchandise until he entered military service as an aviation cadet on 2 February 1941. He was appointed a second lieutenant on 26 September 1941 after successfully completing the requisite flight training. He was promoted to first lieutenant on 15 July 1942 and on 12 October 1943 was promoted to captain.

8. The court was legally constituted and had jurisdiction of the accused and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 94.

Thomas N. Tappy, Judge Advocate

William A. Lumbrell, Judge Advocate

Robert E. Trevethan, Judge Advocate

SPJGH-CM 276866 1st Ind

Hq ASF, JAGO, Washington 25, D. C.

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Alvin M. Walker (0-427059), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of presenting, over a continuous period of two years and three months, 27 false and fraudulent Pay and Allowance vouchers as claims against the United States to various Finance Officers of the United States duly authorized to make payment thereon, in violation of Article of War 94. He was sentenced to dismissal, total forfeitures and confinement for three years. The reviewing authority approved the sentence, remitted the confinement and forfeitures, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. I concur in that opinion. In March 1942, accused executed a Class E allotment of his pay which authorized the Office of Dependency Benefits to deposit the sum of $100 per month, commending 1 April 1942, in the National Bank of Fort Sam Houston, San Antonio, Texas, presumably to insure payment to that bank of a loan made by it to accused. Over the period from April 1942 to June 1944, inclusive (a total of 27 months), the sum of $100 per month was deposited to accused's account in that bank pursuant to the terms of the allotment, making a grand total of $2700 so deposited. During that same period of 27 months accused regularly presented his monthly pay voucher to appropriate finance officers of the United States Army and each of these 27 monthly pay vouchers was false and fraudulent in that accused made claim therein for the total month's pay due him but did not reveal in the appropriate blank provided therefor on the pay voucher form that he had a Class E allotment of $100 per month in existence which constituted a debit against each of his pay claims. Because of accused's concealment of that fact, over a period of 27 months he received not only his full Army pay each month from appropriate finance officers, but also an additional sum of $100 per month under his allotment from the Office of Dependency Benefits to which he was not entitled and which he appropriated to his own use. After the overpayments of $2700 made to accused by the Office of Dependency Benefits were discovered by the fiscal authorities, accused made reimbursement thereof to

the United States.

I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution.

4. Consideration has been given to the inclosed letter from the Honorable Robert A. Taft, United States Senate, dated 28 March 1945, with inclosure from accused's commanding officer, dated 23 March 1945.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should such recommendation meet with your approval.

Myron C. Cramer

3 Incls
1. Record of trial
2. Ltr fr Senator Taft, 28 Mar 45, w/incl
3. Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence as approved by reviewing authority confirmed. G.C.M.O. 227, 13 Jun 1945)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGK - CM 277015

24 MAR 1945

UNITED STATES v. First Lieutenant WINFORD R. BLUE (O-1587137), Quartermaster Corps.	THE INFANTRY SCHOOL Fort Benning, Georgia. Trial by G.C.M., convened at Fort Benning, Georgia, 2 March 1945. Dismissal.

OPINION of the BOARD OF REVIEW
HEPBURN, MOYSE and ANDERSON, Judge Advocates.

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1. The record of trial in the case of the above named officer has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 61st Article of War.

Specification 1: In that First Lieutenant Winford R. Blue, Company "A", (then of company "X") Second Parachute Training Regiment, Fort Benning, Georgia, did, without proper leave, absent himself from his command at Fort Benning, Georgia, from about 18 December 1944 to about 21 December 1944.

Specification 2: In that First Lieutenant Winford R. Blue, * * *, did, without proper leave, absent himself from his command at Fort Benning, Georgia, from about 13 January 1945 to about 25 January 1945.

CHARGE II: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant Winford R. Blue, * * *, having been administratively restricted to the limits of the Alabama Area, Fort Benning, Georgia, did, at Fort Benning, Georgia, on or about 13 January 1945, break said restriction by going beyond the limits thereof.

Specification 2: In that First Lieutenant Winford R. Blue, * * *, did, at Atlanta, Georgia, on or about 15 January 1945, with intent to deceive First Lieutenant William W. Weir, Corps Military Police, 4478th Service Command Unit, Military Police Detachment, Fort McPherson, Georgia, officially state to the said First Lieutenant William W. Weir that he was Sergeant George L. Whitcher's instructor, that he would be responsible

for Sergeant George L. Whitcher, and that he would return with Sergeant George L. Whitcher to Fort Benning, Georgia immediately, which statement was known by the said First Lieutenant Winford R. Blue to be untrue, in that he was not Sergeant George L. Whitcher's instructor and he did not intend to return immediately to Fort Benning, Georgia, with Sergeant George L. Whitcher.

Specification 3: In that First Lieutenant Winford R. Blue, * * *, did, at Columbus, Georgia, on or about 8 January 1945, with intent to defraud, wrongfully and unlawfully make and utter to Classy Clothes Shop, Columbus, Georgia, a certain check, in words and figures substantially as follows:

"No. 2

Venice, Fla.
Venice-Nokomis Bank 8 Jan 1945

Pay to the
Order of Cash $35.00

Thirty-five and ---------- no/100 Dollars

X Co - 4th Bn
2nd PTR

/s/ Winford R. Blue
1st Lt. Inf - 01587137"

Indorsed on back thereof:

Classy Clothes Shop
Columbus, Ga.

and other unintelligible indorsements, and by means thereof, did, fraudulently obtain from the Classy Clothes Shop, Columbus, Georgia, $35.00 lawful money of the United States, he the said First Lieutenant Winford R. Blue, then well knowing that he did not have and not intending that he should have sufficient funds in the Venice-Nokomis Bank, Venice, Florida, for the payment of said check.

Specification 4: In that First Lieutenant Winford R. Blue, Company "A", (then of Company "X") * * *, did, at Fort Benning, Georgia, on or about 3 January 1945, wrongfully and unlawfully make and utter to First Lieutenant Francis T. Hill, The Parachute

School, Fort Benning, Georgia, a certain check, in words and figures substantially as follows:

"Venice, Fla. Dec 3 1944 No.___

Venice - Nokomis Bank
Venice, Fla.

Pay to the
Order of Lt Francis C. Hill $90.00

Ninety and ---------- no/100 DOLLARS

For _____

/s/ Winford R. Blue
1st Lt Inf-0-1587137
X Co - 4th Bn. 2nd PTR"

Indorsed on the back thereof:

Francis C. Hill
1st Lt Inf. 01798260
2nd P.T.R.

Francis T. Hill
1st Lt. Inf. 01798260
2nd P.T.R.

and other unintelligible indorsements, said check being given in payment of a debt, the said First Lieutenant Winford R. Blue, then well knowing that he did not have and not intending that he should have sufficient funds in the Venice-Nokomis Bank, Venice, Florida, for the payment of said check.

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority approved only so much of the sentence as provided for dismissal and forwarded the record of trial for action under Article of War 48.

3. Summary of the evidence.

a. For the prosecution.

Accused was a first lieutenant in the Army of the United States, attached unassigned to Company X, 4th Battalion, 2nd Parachute Training Regiment

Fort Benning, Georgia, on the dates on which he is alleged to have committed the offenses with which he is charged, and assigned to Company A, 5th Battalion of that regiment, at the time of trial (R. 6,7; Pros. Exs. 1, 2 and 3).

Specifications 1 and 2 of Charge I (absence without leave on two occasions) and Specification 1, Charge II (breach of administrative restriction).

Duly authenticated extract copies of the morning report of accused's organization, containing entries showing accused's unauthorized absence from 18 December 1944 to 21 December 1944, and from 13 January 1945 to 25 January 1945, were introduced in evidence without objection (Pros. Exs. 1, 2 and 5). Accused's first absence was reported 18 December 1944 to his company commander, who caused an unsuccessful search to be made for him in the area, and who did not see accused again until 4 January 1945. At that time accused reported to him at the company orderly room that he (accused) had been placed under administrative restraint and was to report to him at the orderly room every morning at 8:30 (Pros. Ex. 3). This restraint had been imposed on accused by the Battalion Executive Officer, 4th Battalion, 2nd Parachute Training Regiment, acting by direction of the Battalion Commander, effective until the charges of absence without leave against him were cleared. Accused was instructed that he was restricted to the "Alabama Area", that is, the training area in use by his organization and the officers' club on the Alabama side of the Chattahoochee River. This restriction was in full force and effect on 13 January (Pros. Exs. 3 and 6). Accused reported daily to the commander of Company X up to and including January 13. On that day the company commander advised accused that while he was still under restriction he would perform duty with Company A, 5th Battalion, 2nd Parachute Training Regiment, which was located in the same camp, about 50 yards from Company X (Pros. Ex. 3). Acting under a "VOCO" accused, although still assigned to Company X, had been reporting to Company A for four or five days prior to 13 January, but failed to report on that day, and was not present with that company or Company X at any time between 13 January and 25 January (Pros. Ex. 3, R. 7,8,9). Accused was not authorized to be absent during that time (R. 8, Pros. Ex. 3). He was in Atlanta, Georgia, on 15 January 1945, was arrested by the military police at a hotel in that city on 25 January and was taken to the Military Police Headquarters, where, after being advised as to his rights, he voluntarily admitted that he had broken restrictions at Fort Benning and was absent without leave. Subsequently on that day he was placed in confinement in the Post Stockade at Fort McPherson and returned to Fort Benning on 27 January (R. 14, Pros. Exs. 4,5).

Specification 2, Charge II (false official statement). George L. Whitcher, a private in Company R, 1st Parachute Training Regiment, who was taking the communications school course at the Parachute School, Fort

Benning, Georgia, had a week-end pass to Atlanta, Georgia, which authorized his absence from his organization at Fort Benning until reveille at 6:30 a.m. on 15 January 1945. He did not return at the required time, and remained absent without leave until 25 January (R. 11, Pros. Ex. 7). This soldier was found in the custody of the military police at their headquarters in Atlanta by the duty officer, First Lieutenant William W. Weir, at about 4:00 to 4:15 in the morning of 15 January when that officer returned from a routine tour of inspection. Upon being brought to the station this soldier had given his name as "Sergeant" George L. Whitcher. Accused was also at the station, seeking Whitcher's release. He represented to Lieutenant Weir that Whitcher was not absent without leave, that he had seen Whitcher's pass in his hotel room, that he was Whitcher's instructor, and that he could "vouch for him and be responsible for his conduct and for his return to his station," that is, Fort Benning. To afford an opportunity for the location of the pass, Lieutenant Weir accompanied accused, Whitcher, and a female companion of theirs to the hotel in a car, remaining outside while they went in, ostensibly to procure the pass. Returning to the car after about five minutes they reported that they had been unable to find the pass. They thereupon went back to the Military Police Headquarters, where Lieutenant Weir instructed the desk sergeant not to book "Sergeant" Whitcher for "AWOL" because accused had stated that he had seen his pass, but merely for "disorderly conduct - for being in the room with a woman not his wife." Whitcher was then "turned over" to accused, who was advised by Lieutenant Weir that he would be responsible for Whitcher's conduct and return to his station, and both accused and Whitcher assured Lieutenant Weir that they would leave immediately for and be at Fort Benning by 8 o'clock that morning (R. 14 to 16, 19,20). Lieutenant Weir released Whitcher to accused because he "respected him (accused) as an officer and a gentleman" (R. 21). Accused was not Whitcher's instructor (Pros. Exs. 3 and 6) and neither returned to Fort Benning as promised, both remaining absent without leave until their apprehension on 25 January (R. 11, Pros. Exs. 4,5,7).

Specifications 3 and 4, Charge II (issuance of bad checks). On 8 January accused obtained $35 in cash from Classy Clothes Shop, Columbus, Georgia, on a check drawn by him to the order of "Cash" on Venice-Nokomis Bank, Venice, Florida (Pros. Ex. A, attached to Pros. Ex. 9, R. 23,24,25). On 3 January 1945 accused was in a dice game at the Officers' Club and lost $90 to First Lieutenant Francis T. Hill. In payment of this loss, accused gave Lieutenant Hill a check on the same bank for $90, erroneously dated "Dec. 3 1944" and erroneously made payable to "Lt. Francis C. Hill." At the time of delivery of the check, accused requested Lieutenant Hill to hold it for about a week until he could redeem it. About four or five days later he advised Lieutenant Hill to forward it to the bank as "there was money there to cover it." (Pros. Ex. 8.) Both of these checks were returned unpaid, after having been duly presented to the drawee bank for payment, because of lack of sufficient funds (R. 24, Pros. Exs. 8 and 9). Accused

had opened an account with the Venice-Nokomis Bank of Venice, Florida, on 2 April 1943, but this account had been inactive since 27 June 1944, on which date the balance to accused's credit was $1.74. There were no deposits or withdrawals in the meanwhile, and when the cashier of the bank testified by deposition on 21 February 1945, the balance remained unchanged (Pros. Ex. 9). The Classy Clothes Shop has never been reimbursed the amount paid accused (R. 25). The record does not disclose whether the check given to Lieutenant Hill has been paid since its return from the drawee bank.

b. For the defense.

Mrs. Dorothy Blue, wife of accused, testified that prior to September 1943, she traveled with her husband to his various posts, but since that time has been living in Lindale, Georgia, with her two children (R. 27,28, 36). She had lived with him in Venice, Florida, where they had opened a joint checking account in the Venice-Nokomis Bank (R. 28,30). For the past eighteen months the relations between her and accused had been strained (R. 31). She received an allotment of $200 a month up to August 1944, at which time the allotment was terminated and thereafter witness depended upon funds furnished her from time to time by accused (R. 31). The first amount received after the termination of the allotment was sometime in October when accused gave her $300, telling her to deposit it. She did not do so and did not mention her failure to accused, who made no inquiries about her compliance with his instructions (R. 32). In December 1944, after Christmas, accused again gave her $300, the first he had furnished her since the October payment. He instructed her to deposit this money also in the Venice-Nokomis Bank. Witness did not comply with these instructions, nor did she notify accused that she had not done so (R. 29,30). At the time of the two payments, accused was stationed at Fort Benning, Georgia, and witness was living in Lindale, Georgia. There was no bank in Lindale, but there was one in Rome, which is 149 miles from Fort Benning and five miles from Lindale (R. 34,36,37). Witness received no bank statements from the bank in Venice after her departure from that city in September 1943 (R. 30, 36), and to the best of her knowledge no deposits had been made since May or June 1944 (R. 34). She had suggested to accused that she should be allowed to take care of all deposits (R. 34). When accused gave her the second $300 in December, he did not inquire whether she had deposited the amount which he had given her in October (R. 34), nor had he made any prior inquiries about her actions (R. 38,39).

After an explanation of his rights, accused elected to testify in his own behalf. Accused was commissioned a second lieutenant in the Quartermaster Corps at Camp Lee, Virginia, on 29 January 1943, and after three weeks' temporary duty was transferred to the Venice Army Air Field, Venice, Florida, where he remained until January 1944. After serving thereafter at Avon Park Army Air Field, Florida, he reported on 24 August at Fort

Benning, Georgia, to take the reconversion course in order to procure a transfer to the Infantry from the Quartermaster Corps. Upon completion of the reconversion course he entered the Parachute School for parachute training on 22 October 1944 (R. 40,41). While in Venice he opened a joint account in his wife's and his name with the Venice-Nokomis Bank and considered it more convenient not to transfer the account when he was assigned to another post (R. 40,41). When accused gave his wife money in October and three hundred dollars in December he instructed her to deposit these sums in the Venice Bank (R. 42). He had no occasion to write any checks between June and November because of his good luck in "crap" games. He did write some, however, in either November or December (R. 42,43). When he gave Lieutenant Hill the check for $90 to cover a bet he had lost in a dice game, accused requested Lieutenant Hill to hold it for a couple of days as $300 was being deposited in his account, and stated that if he collected some money that was due him from other officers he would reimburse Lieutenant Hill without the necessity of "sending it through" (R. 43). Most of the testimony given by the representative of the Classy Clothes Shop was correct (R. 44). With regard to the release of "Sergeant" Whitcher, accused denied that he had ever represented to Lieutenant Weir that he was Whitcher's instructor and that the latter was released to him upon any representations made by him. In response to a telephone call from Whitcher accused had gone to Military Police Headquarters to assist Whitcher, and had then gone back to the hotel, as testified to by Lieutenant Weir, to search for the pass, which could not be found (R. 44-49). Accused was placed in administrative restriction on 21 December 1944, but no investigation was thereafter conducted to the best of his knowledge. He reported for duty to Captain Fuller (Company A) on 13 January 1945.

On cross-examination accused admitted that he was absent without leave from 18 December to 21 December 1944, and that he left Fort Benning on 13 January 1945. He denied that his departure on that day was unauthorized, as, in his opinion, his restriction was illegal, and when he reported to Captain Fuller on Saturday, January 13, he was told by that officer that there would be no duty until Monday. No authority was given him by Captain Fuller to leave Fort Benning. He went with "Sergeant" Whitcher to Atlanta, where he remained until 25 January, at which time he was apprehended by the Military Police. Accused knew that he had no authority to be in Atlanta at that time. He and "Sergeant" Whitcher were registered in the same hotel room in Atlanta on 15 January (R. 52,53,60, 63). He admitted that during November and December 1944 he had issued two or three checks to the Fort Benning Exchange which had been returned unpaid. He was under the impression that they were redeemed by him in December before

he gave his wife the last three hundred dollars, but could not say that a memorandum made by Lieutenant McCreary to the effect that accused had stated that they were paid on 2 January was incorrect. The fact that the checks were not honored by the bank made no impression on accused, as the account was a joint one, and "since that was nearing Christmas that would account for any expenses that she [accused's wife] might have had" (R. 54, 55,56). The check to Lieutenant Hill and that to Classy Clothes Shop, on which he received $35 in cash, were issued after his threechecks to the Post Exchange had been returned unpaid (R. 56), but he expected them to be covered by the money he had given his wife in December, with instructions that she deposit it (R. 58,59). However, he had made no efforts to ascertain from the bank the status of his account (R. 62), nor did he mention anything about the fact that the account had been overdrawn to his wife when he saw her in January (R. 64).

5. That accused was absent without leave, as charged in Specifications 1 and 2 of Charge I, was clearly established. However, the Board finds that the record of trial is legally insufficient to support the finding of guilty of breach of restriction, charged in Specification 1 of Charge II, which is directly connected with the second absence without leave. While the right to impose "administrative restriction" in lieu of arrest or confinement, pending investigation and trial by court-martial, has been recognized by The Judge Advocate General, and while the breach of such restriction, legally imposed, subjects a violator thereof to punishment under the appropriate Article of War (SPJGJ 1943/15606, 5 October 1943, II Bull JAG 426), the restriction, in the case of an officer, must be imposed by his commanding officer, just as in the case of the arrest or confinement of an officer. The commanding officer, vested with this authority, is defined by paragraph 20, Manual for Courts-Martial (1928), as "the commanding officer of a garrison, fort, camp, or other place where troops are on duty and the commanding officer of a regiment, detached battalion, detached company, or other detachment, and their superiors." Not only was no effort made to establish that the 4th Battalion, 2nd Parachute Training Regiment, was a detached organization, but the record clearly shows that it was serving at Fort Benning as a part of that Regiment. Consequently, the commanding officer of the 4th Battalion had no authority to place accused in "administrative restriction" pending the investigation of the charge of absent without leave which had been forwarded to Regimental Headquarters for investigation and action. It naturally follows that accused may not be found guilty of violating a restriction that was not legally imposed (CM 226282, Loring, 15 B.R. 61).

With reference to Specification 2 of Charge II, the accused has been found guilty of making a false official statement to Lieutenant Weir with intent to deceive. Lieutenant Weir testified that the accused represented to him that he was "Sergeant" Whitcher's instructor and if Whitcher were turned over to his custody he would immediately return him to his station.

He relied on these statements and released Whitcher. It was shown that accused was not Whitcher's instructor and it was a fair and reasonable inference to draw from his subsequent actions that accused had no intention of returning Whitcher to his station when he represented that he would. The evidence thus related was therefore clearly legally sufficient to support the finding, but, did the weight of evidence favor that conclusion? The accused denied that he said he was Whitcher's instructor. He claimed that he said Whitcher himself was an instructor at the camp - a fact which Whitcher had told him. He did not deny making the assurance of returning Whitcher to camp. He admitted that he and Whitcher registered in the same hotel room in Atlanta on that same day and both remained absent without leave from camp.

The evidence therefore strongly favors the conclusion reached by the court that Lieutenant Weir's version of what transpired in the Military Police Headquarters was the correct and true one. The Board concurs in that conclusion.

The Board likewise feels no hesitancy in holding that the record is legally sufficient to support the finding that accused with intent to defraud issued his check for $35 to Classy Clothes Shop and thereby fraudulently procured that amount from it in cash, well knowing that he did not have and not intending that he should have sufficient funds in the drawee bank for its payment as charged in Specification 3 of Charge II. The record establishes the fact that accused had been engaged in gambling over a considerable period of time at Fort Benning, that he had made no deposits in the Venice-Nokomis Bank since June 1944, that three of his checks had been returned unpaid in November and December 1944, that he had made no effort to ascertain the status of his account from the bank, and that even if his statement that he had instructed his wife to deposit the three hundred dollars which he had given her in December in their joint account is to be accepted as true he did nothing to determine whether or not she had complied with his instructions. Accused's unconvincing story is not sufficient to show that the check was issued as the result of an honest mistake, not caused by his own carelessness or negligence, and the court was justified in finding that there was no honest mistake. It is worthy of note that accused has not yet refunded the money which he illegally obtained.

The acts described in Specifications 2 and 3 of Charge II, of which accused was properly found guilty, namely, making false official statements, and issuance of a worthless check with intent to defraud, are both offenses under Article of War 96 (CM 274187, and CM 249006, 32 B.R. 5).

With regard to Specification 4 of Charge II, the Board is constrained to hold that the record of trial is legally insufficient to establish that accused "wrongfully" issued his check for $90 in favor of Lieutenant Hill in payment of a debt "well knowing that he did not have and not intending that he should have sufficient funds" in the drawee bank for its payment.

This conclusion is not based on the fact that the check was issued in payment of a gambling debt, but solely on the grounds that there was nothing wrongful in its issuance. According to the testimony of Lieutenant Hill at the time of its delivery to him accused made no representations that accused had sufficient funds on deposit for its payment. On the contrary accused requested him to hold the check until accused could redeem it, and it was only about five days later that accused told him to forward the check to the bank as there was then sufficient money there to cover it. In consequence, it is clear that the check was issued on 3 January 1945 merely as an evidence of an indebtedness and was accepted by Lieutenant Hill as such and not as an order on a bank for the payment of the amount for which it was ostensibly drawn. While accused's transaction with Lieutenant Hill may constitute an offense which makes him amenable to charges under the 96th Article of War, there is no evidence in the record to sustain a finding of guilty of the Specification as laid under that Article, or of any lesser included offense.

6. War Department records show that accused is 26 years and 3 months of age. He is married and has two children. He graduated from High School and attended Martha Berry College for two years, but did not graduate therefrom. His primary civilian occupation is that of laundry mechanic. He was inducted into the service of the United States as an enlisted man in May 1942, and in October 1942 entered the Officer Candidate School of the Quartermaster Corps at Camp Lee, Virginia, graduating therefrom and receiving his commission as a second lieutenant, Quartermaster Corps, Army of the United States, on 29 January 1943. He was promoted to first lieutenant on 18 September 1943. Upon his request for parachute training, he was detailed in the Infantry on 1 August 1944 and assigned to the Infantry Replacement Pool, Fort Benning, for the purpose of attending a special officers' course, upon the completion of which he was authorized to resubmit his request for parachute training. On 3 July 1944 a fine of $83.33 was imposed upon him under Article of War 104 by the Commanding General, Third Air Forces, for absence without leave from 19 June 1944 to 21 June 1944.

7. The court was legally constituted and had jurisdiction of the accused and the offenses. Except as herein noted, no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record is legally insufficient to support the finding of guilty of Specifications 1 and 4 of Charge II, legally sufficient to support all other Specifications and the Charges, and legally sufficient to support the sentence and to warrant confirmation thereof. A sentence of dismissal is authorized upon conviction of a violation of either Article of War 61 or 96.

Earle Deeblum, Judge Advocate.

Herman Moyer, Judge Advocate.

John R. Anderson, Judge Advocate.

SPJGK - CM 277015 1st Ind.

Hq ASF, JAGO, Washington 25, D. C. 1 1945

TO: The Secretary of War

1. Herewith are transmitted for the action of the President the record of trial and the opinion of the Board of Review in the case of First Lieutenant Winford R. Blue (O-1587137), Quartermaster Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Specifications 1 and 4 of Charge II, legally sufficient to support all other Specifications and the Charges, and legally sufficient to support the sentence and to warrant confirmation thereof. I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution.

3. Consideration has been given to a letter from the father of accused to the President dated 22 March 1945. The letter is attached to the record of trial.

4. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

4 Incls
1. Record of trial
2. Drft ltr sig. Sec of War
3. Form of Ex action
4. Ltr fr father of acc'd to Pres. 22 March 1945

(Sentence as approved by reviewing authority confirmed. . GCMO 173, 6 June 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGV-CM 277017

UNITED STATES v. Private DILLARD F. WINTERS (7001201), Company L, 12th Battalion, Third Parachute Training Regiment, The Parachute School, Fort Benning, Georgia.	)	THE INFANTRY SCHOOL Trial by G.C.M., convened at Fort Benning, Georgia, 23 and 26 February 1945. Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
SEMAN, MICELI and BEARDSLEY, Judge Advocates.

1. The Board of Review has examined the record of trial in the case of the soldier named above.

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 93rd Article of War.

Specification: In that Private Dillard F. Winters, Company L, 12th Battalion, 3d Parachute Training Regiment, The Parachute School, Fort Benning, Georgia, did, at or near Douglas, Georgia, on or about 5 January 1945, with intent to do him bodily harm, commit an assault upon Storekeeper Second Class William B. Pate, United States Naval Reserve, United States Naval Auxiliary Air Station, Jacksonville, Florida, by striking him on the body with his fists and feet.

CHARGE II: Violation of the 96th Article of War.

Specification 1: In that Private Dillard F. Winters, Company L, 12th Battalion, 3d Parachute Training Regiment, The Parachute School, Fort Benning, Georgia, did, at or near Douglas, Georgia, on or about 5 January 1945, wrongfully, willfully and unlawfully commit an aggravated assault with intent to do bodily harm on Lieutenant Paul Hardy, United States Naval Reserve, United States Naval Air Station, Jacksonville, Florida, by striking him on the body with his fist, he, the said Private Dillard F. Winters, then knowing that Lieutenant Paul Hardy was a commissioned officer in the United States Naval Reserve.

Specification 2: (Finding of not guilty).

He pleaded not guilty to both Charges and their Specifications and was found not guilty of Specification 2 of Charge II and guilty of the remaining Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years. The reviewing authority approved the sentence and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The record of trial was forwarded for action under Article of War 50½.

3. On the 5th of January 1945 Lieutenant John L. Sehon, Jr., and Lieutenant Paul Hardy, both USNR, and Seaman Pate were approaching Abbeyville, Georgia, en route on a bird hunting trip. At about 11 p.m. while en route to Abbeyville, they stopped on the road for the purpose of finding some soft drinks (R. 6-9, 36), at Fambrough's place. This was a combination gas station, liquor store and lunch counter (R. 12). Lieutenant Hardy left the car and started into the restaurant. As he was entering this place, a soldier came out and grabbed him by the arm. Lieutenant Hardy walked on and was shoved from behind to his knees. He arose and proceeded into the restaurant (R. 13). After Lieutenant Hardy left the car, Seaman Pate also got out of the car and started for the restaurant. He saw the lieutenant sprawled on the ground and the soldier standing over him (R. 37). Almost immediately afterwards, the accused struck Seaman Pate on the left side of the face, knocking him down. The accused then struck him again twice (R. 39). While on the ground Seaman Pate was kicked by the accused behind the ear. He then returned to the car. Either the accused or another soldier attempted to drag him out (R. 42). Meanwhile Lieutenant Hardy left the restaurant and started for the car. Prior to reaching it he was struck on the head by the accused and knocked to the ground. He arose and was knocked down again (R. 15-16). When Lieutenant Hardy finally reached the car Seaman Pate was in a dazed condition and badly battered up (R. 18). After Lieutenant Hardy and Seaman Pate returned to the car they observed Lieutenant Sehon warding off an attack by a second soldier but he managed to get in the car and the three Navy men drove off (R. 19, 59). At the time of the above occurrences the Naval officers were dressed in uniform and wearing the insignia of their commissioned grade (R. 11-12, 23). The Navy men neither said nor did anything to incite the attack (R.18-19). As a result of the occurrences described, Lieutenant Hardy had "quite a big knot on his head" (R. 43) and Seaman Pate suffered a hematoma of the left orbital region, a possible fracture of the maxilla, two chipped teeth and a contusion of the right

mastoid (R. 21, 45).

4. For the defense.

The accused testified that he had nothing intoxicating to drink (R. 139); that he was on furlough at the time (R. 141). He had gone to the described place with his fiancee, his sister, and two brothers. Later he and the two ladies left and got in their car. While sitting there his two brothers came out of the cafe and his brother Frank started fighting with a Naval officer. The accused went to the scene and brought his brother Frank back to his car (R. 143). He did not see Frank strike the officer (R. 145). He did not see the sailor involved in any fight (R. 163). Miss Louise Mabry and Mrs. Maxine Moore, the fiancee and sister, respectively, of the accused and Mr. W. B. Winters, a brother of the accused, in general substantiated his testimony. Each stated that the accused was not drunk and struck no blows. Mr. J. W. Fambrough, who owned the cafe in front of which the altercation took place, stated that he did not see the accused participate in the fracas (R. 148, 190). During this time the accused and Frank Winters, his brother, were the only soldiers present (R. 194). The accused definitely identified one of the men involved in the fracas as an officer of the Navy.

5. It is clear there is a direct conflict of testimony offered on behalf of the prosecution on the one hand and the defense on the other. The court believed the evidence for the prosecution, which is legally sufficient to support the findings of guilty.

6. A serious question however presents itself as to the maximum punishment which may properly be imposed in this case. For the offense laid in Charge I under Article of War 93 of which the accused was found guilty (the assault upon Seaman Pate) the maximum punishment is dishonorable discharge, total forfeitures and confinement at hard labor for one year (MCM 1928, par. 104c). Does such limit apply to the punishment which might be imposed upon the findings of guilty under Charge II and its Specification of assault and battery upon Lieutenant Hardy, an officer of the United States Naval Reserve, with intent to inflict bodily harm? Since the accused was sentenced to three years confinement at hard labor, the court and the reviewing authority evidently were of the opinion that confinement at hard labor for two years for the offense of striking a United States naval officer was not excessive as to this Specification and Charge. The Specification was laid, and properly we think, under the 96th Article of War. It was made upon a naval officer of the United States, in uniform, and the person assaulted was so recognized by the accused. This is not the kind of assault contemplated by

the 93rd Article of War. Nor does it fall under the 63rd Article of War, since a naval officer is not the "superior officer" of an enlisted man of the Army within the meaning of that Article. The term "officer" as used in Article of War 2 means a commissioned officer of the Army. For example, it has been held that a member of the Army Nurse Corps is not a "superior officer" within the meaning of Article of War 64 (CM 212091). In that case it was held that the offering of violence to an Army nurse was an offense under the 96th Article of War. The Board of Review pointed out that "an attack upon an individual clothed with definite military authority is something more than a simple assault." This decision, of course, was rendered before nurses were made commissioned officers by Act of Congress, see AR 40-21 (1941). In SPJGJ (CM 241197), the accused was charged with striking an officer of the British Army in violation of Article of War 64. The Judge Advocate General held the record legally sufficient to support only so much of the finding of guilty of the Specification and of the Charge as involves a finding of guilty of "unprovoked assault and battery, aggravated by committing the same upon a commissioned officer of an Allied & Co-belligerent force while in the uniform of a commissioned officer thereof, in violation of Article of War 96." It was further held in that case that, since the Table of Maximum Punishment prescribes no maximum limit of punishment for the specific offense or any closely related offense, the maximum punishment which may be imposed is within the discretion of the court-martial.

It has been held by a Board of Review that the striking of a commissioned officer can, under certain circumstances, be a simple assault and battery. In the Long case (CM 218883) the accused was charged with striking his superior officer while in the execution of his office. The Board of Review held that, since the facts did not support the conclusion that the officer was in the execution of his office, the accused was only guilty of simple assault and battery under Article of War 96. In that case the assault was held to be not an aggravated one, perhaps because there were many mitigating circumstances, and the officer forced himself upon the accused persistently. Provocation or the lack of it does not change the nature of the offense in most jurisdictions.

It appears to us that the striking of a commissioned officer of the Navy, of an Allied force, or of our own Army (while not in the execution of his office) is not a simple assault and battery but an aggravated one. Winthrop recognizes the distinction between assault and battery upon a civilian on the one hand, and upon a military person on the other, and holds the latter more serious "inasmuch as they directly affect military relations and prejudice military discipline" (p. 724, Winthrop). In the instant case, the assault was aggravated because it was upon a United States

naval officer, in uniform, and recognized as such by the accused.

The term "aggravated assault" is used with some hesitation since it has come to have a technical meaning in many jurisdictions. An aggravated assault is, at the common law, one that has, in addition to the mere intent to commit it, another object which is also criminal; but it may be doubted whether at common law the term had a definite and technical meaning ("Words and Phrases", Perm. Edition, Vol. 2). In many states the term "aggravated assault" has been given a specific technical meaning by statute. Some statutes make the use of a dangerous weapon an aggravated assault, others the intent with which it is to be used is a constituent element. In other cases it includes an assault "where no considerable provocation appears" or where the circumstances show an abandoned and malignant disposition (In re Burns, 113 F. 987, 992). In Texas it has been held that an assault becomes aggravated when committed in the house of a private family (Ward v. State, 151 S.W. 1073).

An aggravated assault may thus be committed in many ways, unaccompanied by the use of a deadly weapon (Indem. Ins. Co. of N.A. v. Scott, 298 S.W. 414).

There is no offense in the District of Columbia Code, or known to the Federal law, as "Aggravated Assault".

The 96th Article of War makes punishable "all disorders and neglects to the prejudice of good order and military discipline and all conduct of a nature to bring discredit upon the military service." An assault upon a naval officer of the United States may therefore be said to be more than a mere assault under the 93rd Article of War since it is aggravated by being "an attack upon an individual clothed with definite military authority". This offense is clearly one which falls under the 96th Article of War. Since no punishment is provided in the Table of Maximum Punishments as set forth in the Manual for Courts-Martial therefor it may be punishable as a court-martial "at the discretion of such" (AW 96) and the punishment directed in this case is not excessive.

7. The accused is 23 years of age, according to the charge sheet. He enlisted 30 October 1939 and has had no prior service.

8. For the reasons stated herein, the Board of Review holds the record of trial legally sufficient to support the findings and sentence.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGN-CM 277030

31 MAY 1945

UNITED STATES	)	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND
v.	)	Trial by G.C.M., convened at Ellington Field, Texas, 26 February 1945. Dismissal, total forfeitures and confinement for one (1) year.
Captain JAMES T. WILLIAMS (O-1699398), Air Corps.	)	

OPINION of the BOARD OF REVIEW
LIPSCOMB, O'CONNOR and MORGAN, Judge Advocates

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1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to the Judge Advocate General.

2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 94th Article of War.

Specification: In that Captain James T. Williams, Air Corps, did, at Ellington Field, Texas, on or about 16 May 1944, feloniously take, steal and carry away:

1 Rate of Climb Indicator Assembly, value about $62.90;
1 Sextant, value about $125.00;
1 Gyro Horizon Indicator Assembly, value about $272.00;
1 Air Speed Indicator Assembly, value about $22.00;
1 Compass, value about $32.10;
1 Compass, value about $32.10;
1 Altimeter Assembly, value about $99.50;
1 Accelerometer Assembly, value about $74.00;
1 Bank and Turn Indicator Assembly, value about $74.75;
1 Drift Meter Assembly, value about $36.53;
1 Portable Electric Drill, value about $21.00;

1 Microphone with microphone cover, value about $8.00;
1 Microphone Extension Cord, value about $10.00;
1 Pyrotechnic Pistol, value about $10.00;

property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for a period of three years. The reviewing authority approved the sentence but reduced the period of confinement to one year and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that from October 1943 to 15 May 1944 the accused was Communications Officer for the Navigation School at Ellington Field, Texas, and had custody of communications and radio equipment used by the School. On 15 May 1944 the Communications Section of the Navigation School was discontinued as a separate unit and was merged into and made a part of "a general communication set-up for the entire Field". At the time of the merger the accused was relieved as Communications Officer and assigned primary duty as Flight Control Officer (R. 55, 60, 61; Pros. Ex. 30). In this new capacity it became necessary for him to change the location of his office. On the evening of 15 May 1944, while in the process of moving, he collected certain items of airplane and communication equipment and placed them in a wooden packing box, which was three feet long, twenty inches wide, and fifteen inches deep (R. 10, 15, 30, 55; Pros. Exs. 1, 30). At the direction of the accused his name and home address were stenciled on the outside. Upon making inquiry as to whether any regulations existed which prohibited the removal of such a box from the Field or required an inspection of its contents, the officers whom he questioned replied that they "didn't know whether there was any such regulation" (R. 11, 12). Leaving the box in his office overnight, the accused made no effort to conceal it and "everything he did with regard to [it] was open and above board" (R. 14).

The next day, 16 May 1944, with the help of an enlisted man, the accused took the box to the Union Railroad Station in Houston. He had been granted fourteen days sick leave and planned to check the box on his railroad ticket and take it home with him (R. 55; Pros. Ex. 30). At the station he was approached by Lieutenant Herbert E. Rathey and other members of the Provost Marshal's office, who inquired as to the presence of government property in the box. The accused answered, "Well, I imagine you will find some in there"; and, stating that it was common practice among officers to take government property, he expressed his intention to send the property home and place it in his den (R. 17, 21, 27, 28, 84). He readily agreed to the opening of the box and an inspection of its contents revealed the following:

One Rate of Climb Indicator Assembly, which had an Army stock list value of $62.90, but was an obsolete or "dead stock item" (R. 30, 39; Pros. Ex. 2).

One Sextant, which had a listed value of $125.00, and was considered a "critical" item, that is, one "to be retained by the Air Forces and repaired when needed [and] not to be conveyed through any sale or resale or turned into dead stock" (R. 31, 40; Pros. Ex. 3).

One Gyro Horizon Indicator Assembly, also a critical item, which was listed as having a value of $272.00 (R. 33, 40, 41; Pros. Ex. 4).

One Air Speed Indicator Assembly, which was a "repairable" item with a listed value of $22.00 (R. 33, 41; Pros. Ex. 5).

Two identical compasses, both wrapped in unbroken cellophane and having a listed value of $32.10 each (R. 32, 33, 41; Pros. Exs. 6 and 7).

One Altimeter Assembly, with an unbroken seal, and with a listed value of $99.50 (R. 32, 33, 42; Pros. Ex. 8).

One Accelerometer Assembly, having an Army stock list value of $74.00 but now obsolete and valuable only as salvage (R. 33, 42; Pros. Ex. 9).

One Bank and Turn Indicator Assembly, having a list price of $74.75 but obsolete (R. 33, 43; Pros. Ex. 10).

One Drift Meter Assembly, listed in Army stock records as worth $36.53 but now obsolete (R. 33, 43; Pros. Ex. 11).

One Portable Electric Drill, which had a price list value, as well as a commercial market value, of $21.00 (R. 44, 33; Pros. Ex. 12).

One Microphone with microphone cover, which had a reasonable market value of $8.50 (R. 33, 47; Pros. Ex. 13).

One Microphone Extension Cord, reasonably worth $10.00 (R. 33, 48; Pros. Ex. 14).

One Pyrotechnic Pistol, valued at $10.00 (R. 33, 48; Pros. Ex. 15).

The foregoing items were property of the United States and were furnished and intended for the military service thereof (R. 44, 47, 48;

Pros. Ex. 30). The items described in Exhibits 2-12, inclusive, were generally used by the Air Forces for training and experimental purposes and could also be used on privately owned airplanes. They were generally referred to as "unaccountable" property (R. 44, 45).

The items listed above were those set forth in the Specification as the subject of the alleged larceny. In addition, the following articles were found in the box (R. 34, 35):

Life raft cover, marked "Property Air Forces, U.S. Army * * *" (Pros. Ex. 16)
First Aid kit and contents (Pros. Ex. 17)
Clock mounted in wood and plastic material (Pros. Ex. 18)
Electric soldering iron (Pros. Ex. 19)
Electric soldering iron (Pros. Ex. 20)
Hand drill (Pros. Ex. 21)
Drill holder and drills (Pros. Ex. 22)
Pocket compass (Pros. Ex. 23)
.45 caliber pistol cartridges, automatic, including clips (Pros. Ex. 24)
Two canvas carrying straps (Pros. Ex. 25)
Two canvas field bags (Pros. Ex. 26)
Preliminary Handbook of Instructions, marked 08-10-54, and Book of Instructions, marked 08-10-128 (Pros. Ex. 27)
Two sheets and one pillow case (Pros. Ex. 28)
Brief case containing one bath towel (Pros. Ex. 29)

After the box had been opened at the railroad station and a list of the contents completed, the accused was told that he could proceed on his journey or return to the Field. He decided on the latter course in order to "get all this straightened out". After his return to the Field he made a voluntary statement in which he said that the articles in the box were "unaccountable property" for which he considered the army had no further use and which he intended to take home and use as his own, with the exception of the sextant, which he expected to return to Ellington Field. He admitted that the property belonged to the United States government but claimed that it was valuable only as salvage and was not serviceable in airplanes. The accused further stated that, at the time he packed the wooden box, he collected the property for which he was accountable and this he stored in his quarters. He pointed out that there were other instances in which salvaged property was taken away and not returned by military personnel (R. 55; Pros. Ex. 30).

Colonel Ralph C. Rockwood, Commanding Officer at Ellington Field, testified that government property could be removed from the Field on written authority but that the accused had requested no such authority (R. 58, 59). Major William J. Curtis, Staff Personnel Officer at Ellington Field, testified that the accused had been submitted as an uncertified officer to the Commanding General of the Army Air Forces Central

Flying Training Command but that the Reclassification Board subsequently directed the certification of accused (R. 60, 61).

4. The defense introduced the stipulated testimony of Colonel John W. Egan, who had been Director of Training at Mather Field, California, and under whom the accused served for a period of eight months. According to Colonel Egan, long range navigation missions were flown over water, mountains, and desert terrain, and, to obtain flight control, radio contact had to be maintained with the planes at all times. Since it was impossible for the training organization to obtain priorities for radio equipment, it became necessary to use salvaged parts "to improvise radio sets for communications and direction finding purposes". The accused did much of this improvisation and experimentation "in various places and whenever time permitted". Although handicapped by inexperienced personnel and lack of proper equipment, the manner of performance by accused was excellent. Colonel Egan stated that he had read the charges preferred against the accused and found it difficult to "believe he would do this" (R. 56; Def. Ex. 1).

Captain Frank R. Quinlivan, whose stipulated evidence was also offered by the defense, had been assigned to the Navigation School and had worked with the accused at Mather Field and Ellington Field. At both places a shortage of equipment existed and it became necessary to obtain instruments and other items of equipment from every "legitimate" source. While at Mather Field Captain Quinlivan and the accused often went to nearby McClellan Field for equipment and later from Ellington Field the two made several trips to Kelly Field, Texas. There they procured various items of equipment from the Area Training Officer and the "class 26 Warehouse" in which surplus property was kept. These transactions at Kelly Field were informal and the articles were not usually signed for, but Captain Quinlivan nevertheless regarded them as government property, intended for training purposes and not for personal use. He had a gyro horizon and accelerometer in his custody in the Training Aids Department and, because he was not accountable and had no use for these items, he delivered them to the accused for experimental purposes but did not consent to their removal from Ellington Field. Captain Quinlivan did not know of any new and "cellophane wrapped equipment" being delivered to the accused. Such material was of "intrinsic value" to the Air Forces but its control was lax at the time in question. The only item of equipment which Captain Quinlivan noticed in the accused's office was an eight-day clock of the type used on the instrument panel of AT-18 and C-60 aircraft. The accused never made reference to any unauthorized use of government property or its removal from Ellington Field. He did not request Captain Quinlivan's permission to store any equipment. Storage space was available. It was the accused's hobby to experiment with communication and radio devices (R. 56; Def. Ex. 2).

On 8 March 1944 the accused initiated a request for transfer to the Air Service Command and assignment to McClellan Field, Sacramento,

California. This request was denied because there was no suitable vacancy for him in the Air Service Command (R. 61; Def. Ex. 3).

The accused, after his rights relative to testifying or remaining silent had been explained to him, elected to take the stand in his own defense (R. 63). He testified that he had been interested in radio mechanics since early high school days and, since his entry into the Army, had worked with flight, communications, and electrical devices. He had been particularly interested in the uses of the sextant with a view to improving certain devices used by navigators and pilots for position plotting (R. 63). Such a dearth of supplies existed at Mather Field that a practice developed "of collecting everything we could possibly use", and much of this equipment came originally from McClellan Field. It was taken to Mather Field at the direction of Colonel Egan (R. 63, 64). The accused handled much "unaccountable" government property for the departments of Synthetic Devices and Training Aids at Mather Field and while stationed there he performed some of his experimental work at his home. After the Navigation School was moved to Ellington Field, the accused returned to Mather Field at the direction of Colonel Saxon, Commanding Officer of the School, to obtain several items of "Training Aids" equipment (R. 65). The accused had a considerable amount of government property entrusted to him as a commissioned officer and never attempted to sell any of it (R. 64, 67).

After the accused moved to Ellington Field, he had certain flight instruments in his office "primarily" to complete the trainer which he had started at Mather Field (R. 66). He changed the location of his office on 15 May 1944 and packed the equipment in a wooden box for storage (R. 66). He requested Warrant Officer Ross to place the box and other packages in the storeroom. Mr. Ross indicated that he did not wish to comply with the request but suggested that he would provide transportation facilities to the station if the accused wished to take the box with him. The accused had not planned to take the box home until Mr. Ross expressed reluctance to store it, but then decided that "if I had to I would take the things around with me" (R. 64). The box remained in the accused's office overnight and on 16 May 1944 was taken by government truck to the railroad station (R. 66). The statement which he made that evening was not accurate because his poor physical condition made him nervous and excited. "I couldn't think, I couldn't collect my thoughts as to * * * what led up to this investigation" (R. 82). At the time of a formal investigation on 2 June 1944 the accused repudiated the following portion of his statement of 16 May 1944:

> "and which I felt would be of no further use to the Army. This property had been laying around my office for a considerable length of time. I definitely had no use for this property except as reference after the war."

Furthermore, he did not remember saying that he "had intended to deliver the property to my home in Sacramento and consider it my own" (R. 65).

On cross-examination the accused admitted that, with the exception of the sheets, pillow case, towel and brief case, the property in the wooden box belonged to the government, and that the items described in the Specification were obtained from Mather Field, Kelly Field, or Ellington Field. He had not been required to sign any receipt making him accountable therefor (R. 75-77). A life raft cover was found in the box and the contents of the raft cover had been taken by him to the home of a friend in Houston for use in her swimming pool but they were subsequently returned to the Field and placed in salvage. He referred to the life raft in his letter of 17 June 1944 to Major Ray Bell, G.S.C., Washington, D.C., when he wrote: "The thing that I had out at Elizabeth's was also brought back by an officer and successfully put back in the junk heap" (R. 68-70). At the time of this occurrence on 16 May 1944 the accused was recovering from a hemorrhoid operation. If he had been well, he would have "distributed" the property to its proper places (R. 79). Warrant Officer Ross, however, practically "talked [him] into taking" the property and seemed "very anxious" that the accused remove it from the Field (R. 78). The accused felt that Mr. Ross had been "sore" since he failed to obtain a promotion (R. 79).

The accused denied making the statement that he intended to place the property in his den (R. 77). He stored in his quarters the property for which he was accountable (R. 80).

The prosecution brought out, also on cross-examination of the accused, that his home had lately been searched by a United States Marshal and that a Leer receiver and transmitter set, made of salvaged government property, and other items of United States property were found (R. 70). In this connection a statement by the accused was introduced by the prosecution which asserted that it was his practice, while stationed at Mather Field, to take salvaged radio equipment to his home in Sacramento for experimental work. He assembled a transmitter and receiver set and took it back and forth several times from his home to Mather Field. When he was transferred to Ellington Field, he left the radio set at his home. Of the eleven incomplete "Leer sets", consisting of transmitters, and receivers, which were used at Mather Field, only three were taken to Ellington Field. The remaining sets were discarded and left outside the Communications building at Mather Field where personnel from other sections collected and removed them (R. 72; Pros. Ex. 31).

5. The prosecution offered as a rebuttal witness Staff Sergeant William Francis Baggott who testified that he was present at the railroad station when the accused was first questioned about the contents of the box and heard the accused say that he planned to put the property in his den (R. 84).

6. The Specification of the Charge alleges that the accused "did, at Ellington Field, Texas, on or about 16 May 1944, feloniously take,

steal and carry away * * * property of the United States, furnished and intended for the military service thereof". This property, which is itemized in the Specification, is alleged to have a value of $879.88.

The Manual for Courts-Martial defines larceny, the offense alleged, as follows:

> "Larceny is the taking and carrying away, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with intent to deprive such owner permanently of his property therein." Par. 149g, MCM, 1928.

The evidence shows that the accused was Communications Officer at Ellington Field, and, as such, had in his custody certain items of radio and flight equipment. He packed a number of such items in a wooden box, had his name and address stenciled on the outside, and carried the box by government vehicle to a railroad station eighteen miles from the Field. At the station he was approached by military policemen who, with his permission, examined the box and found that most of its contents consisted of government property.

The defense, in a brief filed with the record, contends, however, that the accused and not the government was possessed of the property in question and that the accused committed no trespass upon the government's possession. This contention is untenable. The Manual for Courts-Martial in drawing the distinction between "possession" and "custody" defines possession as "the present right and power absolutely to control a thing" and further states that:

> "Where a servant receives goods or property from his master to use, care for, or employ for a specific purpose in his service, the master retains possession, and the servant has the custody only and may commit larceny of them. A person, then, has the 'custody' of property, as distinguished from the 'possession', where, as in the case of a servant's custody of his employer's property, he merely has the care and charge of it for one who still retains the right to control it, and who, therefore, is in possession (i.e., constructive possession as distinguished from actual possession) of the property." Par. 149g, MCM, 1928.

In the instant case it is clear that the United States relinquished none of the "present right and power" to control the property and that the accused had only the "care and charge of it". His power over the property was limited to its use in training and instructing the students at the Navigation School. The fact that some of the items were obsolete and valuable only as salvage and that the accused was allowed to experiment in order to improve training devices and methods does not mean that he

had the right "absolutely to control" the property. His right to use the equipment was subject to the control of his superior officers. He had only "custody" of the property and the constructive "possession" remained in the United States. When he took the property from Ellington Field without authority, the accused committed a trespass within the law of larceny. See 12 BR 400, CM 220398, Yeager.

Secondly, the accused contended that he had no intent permanently to deprive the United States of the property described in the Specification. According to the statement made by the accused on the night of the alleged offense, the property was "unaccountable property, * * * which I felt would be of no further use to the Army.* * * I had intended to deliver the property to my home in Sacramento and to consider it as my own, with the exception of the sextant which I intended to use while in California and which I intended to bring back to Ellington Field". One of the men who was present at the railroad station when the box was opened testified that the accused at that time expressed the intention to place the property "in his den". These statements cogently indicate that the accused intended to keep and treat the property as his own. He subsequently took the position, however, that his original statement was not accurate and he repudiated the assertion that he considered the property of no further use to the Army and intended to treat it as his own. In further refutation of his original statement the accused testified that he first attempted to have the wooden box stored and, failing in this, he decided "if /he/ had to /he/ would take the things around with /him/." It seems highly unlikely that he would transport the box to his home in California merely because Warrant Officer Ross was reluctant to place it in storage. There appears to be no reason why the accused did not leave the box in his quarters, as he had done with the property for which he was accountable. The more plausible explanation of his purpose is found in his original statement wherein he suggested, in substance, that he was doing no more than other officers who had taken away government property and retained it. There is ample evidence that the accused intended to keep the property in question permanently.

In establishing the larceny of the fourteen specified items of government property described in the Specification the prosecution introduced into evidence the entire contents of the wooden box which included some twelve additional articles of United States property. In this procedure there was no error, for it is competent for the prosecution, in developing its case to prove that other property was taken at the same time and place as the property in question. Wigmore on Evidence, 2nd Ed., Sec. 218.

One such additional item was a life raft cover. On cross-examination the accused objected to questions about the life raft, apparently on the ground that such questions might incriminate a friend in whose possession the raft had been. The privilege against incrimination is the privilege against self-incrimination and the ruling of the law member in compelling the accused to answer the question was proper.

The prosecution went further, however, and during the course of the cross-examination of the accused the following colloquy occurred:

"Q. Now, Captain, after you were arrested some more Government property was found in your home, wasn't it?

A. Yes, sir.

Q. There was a Leer receiving set, a Leer sending set set up for production, wasn't it?

A. It was salvaged parts.

Q. It was part of some $10,000 worth of equipment you got out of Norwegian airplanes and you had taken them on with you?

DC. I object to that as irrevelant.

TJA. If the court please, he went into it. It happened on Mather Field.

LM. I will overrule the objection.

Q. Isn't that correct?

A. Yes, sir."

Following the foregoing colloquy a full statement previously secured from the accused was admitted into evidence showing that a substantial amount of government property, which had recently been found in the accused's home, had been placed there a year before by the accused.

The trial judge advocate, in introducing the above described evidence and in cross-examining the accused concerning it, may well have proceeded upon the theory that, since the accused had testified that he had not intended permanently to appropriate the property in question, the prosecution was justified in seeking to contradict such contention by showing other similar acts of the accused in wrongfully taking and retaining government property. In determining the correctness of this procedure, we are confronted with the basic rule that, "* * * When a defendant is put on trial for one offense, evidence of a distinct offense unconnected with that laid in the indictment is not admissible". Johnston v. United States, 22 F. (2d) 1. The reason for this principle, which is one of the features distinguishing the Anglo-American system of justice from other systems of the civilized world, is the fear that the accused may be unduly prejudiced and may be convicted because of other offenses rather than for the offense for which he is being tried. 46 Harv. L. Rev. 954. On the other hand, when the other offenses are similar to the offense in question, they may have real probative value. We find, therefore,

that the general rule is subject to exceptions. The Manual for Courts-Martial has recognized these as follows:

> "When criminal intent, motive, or guilty knowledge in respect of the act is an element of the offense charged, evidence of other acts of the accused, not too remote in point of time manifesting that intent, motive, or knowledge, is not made inadmissible by reason of the fact that it may tend to establish the commission of another offense not charged." MCM, 1928, par. 112b.

In King v. United States, 144 F. (2d) 729 (1944), the Circuit Court of Appeals of the Eighth Circuit, in considering the present question, made the following pertinent statements:

> "The exception relied upon by the government in this case is that evidence of other offenses by the accused is admissible to show criminal intent (1) where the other offenses are similar to and (2) not too remote in time from that charged. * * *
>
> "Of these two indicia of admissibility of evidence of other offenses to show intent, the first, similarity, must upon appeal be determined from the record while the second, remoteness in time, is committed to the discretion of the trial court and 'should not be interfered with by a reviewing court unless it is clear that the questioned evidence has no connection or bearing upon any of the issues involved in the charge'. Neff v. United States", 8 Cir., 1939, 105 F. 2d 688.

Similar observations were made in Holt v. United States, 6 Cir., 1930, 42 F. (2d) 103.

In Wood v. United States, 16 Pet. 342, 10 Law Ed. 987 (1842), the Supreme Court of the United States stated that:

> "* * * where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate or establish his intent, or motive in the particular act, directly in judgment. Indeed, in no other way would it be practicable, in many cases, to establish such intent or motive, for the single act taken by itself may not be decisive either way; but when taken in connection with others of the like character and nature, the intent and motive may be demonstrated almost with a conclusive certainty."

In the present case, although the similar acts of the accused in wrongfully taking government property to his home ante-dated his more recent act by a year, the property originally appropriated by him was still in his possession at his home at the time of his commission of the offense in question. His conduct in retaining such property for a period of a year affords a very logical basis for the inference that he intended likewise to retain the property more recently taken. The relevancy of these former acts cannot be disputed. The court was accordingly justified in receiving the evidence under discussion on the issue of intent, and no fundamental right of the accused was violated thereby.

7. The accused is about 37 years of age and is married. He was graduated from high school in 1925 and subsequently took a four year correspondence course in radio and electrical engineering. He also attended night school where he studied photography, public speaking, and metals and woodwork. From 1933 to 1941 he was employed in the banking business, both as teller and cashier, and at one time owned a hotel and restaurant. He was an enlisted man in the United States Marine Corps Reserve from 1930 to 1934 and was a pilot in the Royal Canadian Air Forces from 5 May 1941 to 23 May 1942. He entered on active duty as a first lieutenant in the Air Forces of the Army of the United States on 25 May 1942 and was promoted to captain on 29 May 1943.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 94.

Abner E. Lipscomb, Judge Advocate.

Robert J. Clamon, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 277030 1st Ind
Hq ASF, JAGO, Washington 25, D. C.
TO: The Secretary of War JUN 20 1945

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain James T. Williams (0-1699398), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of the larceny of certain government property, furnished and intended for the military service, in violation of Article of War 94. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for three years. The reviewing authority approved the sentence but reduced the period of confinement to one year and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority and to warrant confirmation thereof.

As Communications Officer at the Navigation School, Ellington Field, Texas, the accused developed the practice of collecting radio equipment from every available source and using it for experimentation and improvisation in the development of training aids. At the time of his transfer from Mather Field, California, he brought several items of radio equipment with him to Ellington Field, and subsequently procured other parts from Kelly Field, Texas. Such equipment was generally regarded as "unaccountable" property because no officer had signed for it and its control was admittedly lax. On 16 May 1944 the accused left Ellington Field to go home on leave and took with him a wooden packing box which contained the items of government property described in the Specification. Such equipment had an Army stock list or market value of $879.88. Upon reaching the railroad station in Houston he was approached by military policemen who requested permission to open and examine the contents of the box. The accused readily consented and conceded that several items of government property were to be found in the box. He explained that he felt the property was of no further value to the Army and that he was taking it to his home in Sacramento, California, and would "consider it my own".

An examination into his civilian background and military record reveals much that is favorable to the accused. For seven years he was engaged in the banking business as accountant, teller, and cashier, and at one time owned a hotel and restaurant. With the highest recommendations from his civilian associates the accused, at the age of 34, entered the

Royal Canadian Air Force and served as a pilot from 5 May 1941 to 23 May 1942. When, on the latter date, he left Canada to accept a commission in the Air Forces of the Army of the United States, Canadian officers expressed unqualified praise for his performance. Said his group captain:

> "His ability and willingness to work has been outstanding and his character and deportment are beyond reproach. Not only has this officer performed his routine tasks very well, but has shown a high degree of initiative and original thinking which has been beneficial to his superiors. Regardless of rank, this officer has been the most satisfactory of any of the American pilots stationed at this unit."

The accused subsequently served as Communications Officer at Mather Field under Colonel John W. Egan who stated that the accused's manner of performance was excellent. Colonel Egan pointed out that the accused in performing a difficult assignment was handicapped by lack of experienced personnel and necessary equipment but displayed great "initiative" and "ingenuity". It is clear from the record that the industry and resourcefulness of accused constantly impressed his associates.

It was his great interest in radio which led to the commission of the larceny for which he now stands convicted. His act in taking the equipment which admittedly belonged to the government is highly reprehensible. It should be pointed out, however, that he was influenced by the loose practice which had developed in connection with the supervision of unaccountable property. Neither secrecy nor subterfuge surrounded his actions in packing and taking the property and, when approached at the station, he stated simply that he thought the property was of no further use to the Army.

The larceny was clearly established and because of this indefensible act the accused should not be retained in the service. It seems clear, however, that the accused is not a criminal type. In view of this fact, and his prior excellent record, I am of the opinion that the confinement should be remitted. I recommend, therefore, that the sentence as approved by the reviewing authority be confirmed but that the confinement and forfeitures be remitted, and that the sentence as thus modified be ordered executed.

4. Consideration has been given to letters from Honorable Tom Connally, Sheridan Downey, and Claude Pepper, United States Senators, Honorable Helen Gahagan Douglas, member of Congress, and Mr. G. W. Brownridge, recommending clemency in behalf of the accused, and to a brief submitted by the accused.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

8 Incls
Incl 1 - Record of trial
Incl 2 - Form of action
Incl 3 - Ltr. fr. Hon. Tom Connally
Incl 4 - Ltr. fr. Hon. Sheridan Downey
Incl 5 - Ltr. fr. Hon. Helen G. Douglas
Incl 6 - Ltr. fr. Hon. Claude Pepper
Incl 7 - Ltr. fr. Mr. G. W. Browndridge
Incl 8 - Brief submitted by accused

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence as approved by reviewing authority confirmed but the confinement and forfeitures remitted. GCMO 316, 7 July 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGQ - CM 277217

UNITED STATES	)	ARMY AIR FORCES WESTERN TECHNICAL TRAINING COMMAND
v.	)	Trial by G.C.M., convened at Amarillo Army Air Field, Amarillo, Texas, 26 February and 2 March 1945. Dismissal and total forfeitures.
Captain ALFRED SHERMAN (0-570220), Air Corps.	)	

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OPINION of the BOARD OF REVIEW
ANDREWS, FREDERICK and BIERER, Judge Advocates

- - - - - - - - - - -

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Captain Alfred Sherman, assigned Section "B", 3701st Army Air Forces Base Unit, did, at Borger, Texas, on or about 13 January 1945, with intent to do him bodily harm, commit an assault upon Private Chester Czajkowski, by willfully and feloniously striking the said Private Chester Czajkowski on the arm and shoulder with a club.

The accused pleaded not guilty to, and was found guilty of, the Specification and Charge. He was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentence and forwarded the record pursuant to Article of War 48.

3. The evidence for the prosecution established the following state of facts.

On the night of 13 January 1945, at Borger, Texas, Private Chester Czajkowski (R. 8), was "pretty well drunk" (R. 20, 24), and causing a disturbance (R. 18). He was escorted from a dance at the Moose Hall to the police station (R. 9) by the accused, on military police duty (R. 46), and a private first class (Buehler), military police. There he was questioned by the accused and became angry and "sarcastic" (R. 10). The accused called for and obtained a club

(R. 10), which was a sawed-off butt end of a billiard cue, about 17 inches long, weighing 11½ ounces, apparently well worn and cracked (R. 44; Ex. A). The accused struck Private Czajkowski in the stomach with the club and ordered him to stand at attention (R. 10). The questioning proceeded for about fifteen minutes, during which time the accused struck Private Czajkowski a number of blows estimated by Private Czajkowski as from 15 to 18. The accused jabbed Private Czajkowski in the pit of the stomach and forced him into a corner, ordering him to raise his hands above his head. Most of the blows fell on the soldier's forearm, as he tried to protect himself. He was struck three or four times underneath his armpit, received some blows across his back and one on his head (R. 11, 12). In the beating, Private Czajkowski sustained a simple fracture of the left ulna (R. 12), which necessitated his carrying his left arm in a cast and was not entirely healed at the time of trial, some stiffness and deformity remaining in his wrist (R. 14). His bruises were swollen, discolored and painful the day after the beating, and his head was cut and had blood on it (R. 14, 15). The court, at the trial, inspected a "place" on the soldier's head which he exhibited as the point of impact of the club (R. 28).

Captain Vermeulen, medical officer at Amarillo Army Air Field (R. 28), treated Private Czajkowski's injuries on 14 January 1945, and found bruises, abrasions and swelling about the left arm, shoulder and armpit, and a chipped fracture of the left lower forearm and wrist (R. 29, 30). The arm was badly swollen, so that it was difficult to determine where the wrist was. It was impossible for the soldier to move his wrist (R. 29). It was necessary to wait for the swelling to subside before putting the arm in a cast (R. 30). No head injury was called to the doctor's attention at the time, but upon inspection at the trial he found a one-half inch scar, slightly red, consistent with a minor injury from a blow on the soldier's head at the time of the other injuries (R. 33).

City Policeman Spraggins observed a part of the occurrences at the police station. The soldier was "cussing and staggering around in there", "cussing the Army", proclaiming his Brooklyn origin, and reviling Texas, Texas men and women, and the accused, and damning the accused as a "son-of-a-bitch", "bastard" and "cock-sucking Jew". The captain was hitting the soldier and "jobbing" him in the belly with a stick (R. 34, 35, 41). The soldier was mean, "the meanest boy I ever seen", but "he got beat up pretty good"--"he got a beating" which the witness compared to the beating of a mule (R. 37, 39, 41). The witness estimated that the beating went on for twenty to thirty minutes (R. 36). After the accused left, the witness and the chief of police put merthiolate on a small bruise on the soldier's head, which was bleeding, and observed red places on his arms, shoulder and ribs (R. 38).

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NAVY DEPARTMENT

4. The accused testified (R. 47). He is 26 years old, married, a resident of Meriden, Connecticut. He volunteered for induction as an officer candidate, reporting on 13 June 1942. He was commissioned a second lieutenant after basic training and upon graduation from Officer Candidate School at Miami Beach, Florida, in September 1942. He remained at Miami Beach as a training officer until transferred to Amarillo 29 May 1943, where he continued as a training officer, Group and Centralized, until he was assigned to military police duty prior to 13 January 1945 (R. 48, 49). Shortly before midnight on 13 January 1945, the accused and Private First Class Buehler, acting upon a complaint, took Private Czajkowski from the Moose Hall in Borger, Texas, to the police station (R. 49, 50). They tried to get Private Czajkowski to stop swearing and say where his hotel room was (R. 50). He was booked for being drunk and disorderly. Accused requested him to empty his pockets, but he did not comply. Accused then ordered him to raise his hands over his head, while Private First Class Buehler removed the articles from his pockets. Private Czajkowski kept pushing Buehler's hands away and threatening accused, waving his clenched fist in accused's face (R. 51). He kept shuffling about, and did not come to attention when ordered. Accused obtained the club (Ex. A), and slapped it down very hard on the desk in front of Private Czajkowski, to scare him, as a result of which the club splintered (R. 52). Private Czajkowski made a pass at the accused with his right fist. The accused, in self-defense, struck Private Czajkowski on the upper left arm with the club. As Private Czajkowski grabbed at the accused with both hands, accused struck him two or three times more and jabbed him lightly in the pit of the stomach. There was a scuffle. Private Czajkowski was obscene and abusive. Policeman Ayres and Private First Class Buehler were present. The Chief of Police and Policeman Spraggins came in later. Accused believed that he was acting in line of duty (R. 54). Later, Private Czajkowski was "rather sheepish about the thing," and "made some remark about laying off liquor and staying on the beam, and he was more or less apologetic" (R. 54, 55). Accused did not know of his striking the soldier on the head (R. 55). Accused was placed on duty at Borger about two months before, merely helping Sergeant Hunt (R. 55). He was so assigned at his own request, but received no instructions at all (R. 61). All in all, Private Czajkowski swung at accused three or four times and accused jabbed him in the stomach two or three times and struck him two or three times to "make him straighten up, sir, and to keep him away from me" (R. 58). Accused would say that Private Czajkowski was in the room between twenty and thirty minutes, before being taken to a cell (R. 59). Nobody restrained the accused from further actions. The Chief of Police said to Private Czajkowski something about "let's stop it here" (R. 60).

Policeman Ayres testified for the defense (R. 61). He looked through the door and saw the accused waving the stick to keep the soldier back. It seemed like the captain tried to protect himself.

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Private Czajkowski was drunk, cursing and swearing (R. 63). Accused said he did not need any help, and witness got out, but could hear everything from another room (R. 64).

Sergeant Hunt (R. 65) called Private Czajkowski out of the dance hall and turned him over to accused outside. Accused asked Private Czajkowski where his hotel room was and cautioned him against profane and abusive language in the presence of ladies, but the soldier continued to use abusive language (R. 65), and the Captain asked him to get into the staff car. The soldier was drunk (R. 65, 66).

Captain Doane (R. 67), commanding officer of the accused at Miami Beach, from December 1942 to May 1943, testified to superior performance by the accused of his duties as training officer during that period (R. 67, 68).

Private First Class Buehler (R. 69), military police, accompanied the accused and Private Czajkowski from the dance hall to the police station, and there searched the soldier at the accused's orders. The soldier did not comply with orders to turn over his personal belongings nor to stand at attention. He was cursing and abusing the accused (R. 70). Accused hit the desk with a stick and told Private Czajkowski to straighten out and act like a soldier. Private Czajkowski cursed the accused and "swung around" at him with his fists clenched. He did not strike accused (R. 71). It took the witness thirty minutes to search Private Czajkowski. Finally the accused hit Private Czajkowski on the arm and told him to turn around to finish being searched. Accused did not ask for help at any time. The Chief of Police and Policeman Spraggins came in, but stayed only a few minutes. Private Czajkowski was drunk, using loud and profane language (R. 72, 73). In the opinion of the witness, from eighteen to twenty months military police experience, it was necessary to use force to put him in jail, but, not being in the captain's place, witness could not say whether more force was used than was necessary (R. 73). Accused came over to Borger only on Thursday and Saturday nights. Except that he had to be forced into the staff car, Private Czajkowski had made no resistance other than cursing until the accused hit the desk with the club and said "you had better straighten up because we may have to use this." Private Czajkowski then clenched his fists (R. 74, 75).

The accused resumed the witness stand and denied saying "we may have to use this club" (R. 76).

The accused's Officer's Qualification Record, WD, AGO Form 66-2, was introduced in evidence (R. 77; Def. Ex. 1). It showed four superior and one excellent ratings as Group Training Officer and three excellent ratings as Centralized Training Officer, with other data concerning the accused.

5. Chief of Police Julian, of Borger, Texas (R. 78), called as a witness for the court, entered the room at the police station while the accused, Private First Class Buehler and Private Czajkowski were there, remained for a minute or more, and left, returning shortly thereafter. He saw and heard the accused and Private Czajkowski scuffling and fighting. Accused was hitting the soldier with some kind of a night stick, when the witness entered, and ordered him to come to attention. The soldier "would kind of come up--not to attention, I wouldn't say, but he kind of made an effort." The captain told him he did not have any respect for the Army and did not act like a soldier, and the soldier called the captain an abusive name. The captain struck him several times (R. 79). The witness went and got a drink of water and returned. The soldier was up, near the jail door, and the witness directed that he be put in the jail. Private First Class Buehler opened the door and the accused pushed Private Czajkowski on into the jail (R. 80). Later, the witness looked Private Czajkowski over to see if he needed medical attention, had him remove his blouse and shirt, and put merthiolate on his bruises, which was all the medication they had (R. 81). The witness saw Private Czajkowski move toward the accused, but did not see him grab or strike the accused, nor hear him threaten the accused. Witness was not there at the start of the "fight" (R. 81, 82). When the witness directed that he be put into a cell, the soldier was getting up from a position with one knee on the floor (R. 82). When the witness first came in, accused was hitting the soldier "quite fast," with repeated blows one after another (R. 85). Asked by the court why he returned to the room and suggested that the soldier be put into a cell, the witness explained that sometimes when a police officer makes an arrest and has to defend himself, he gets mad and gets a little out of line himself, and gets going too far and then "it is customary for a police officer to give a man any assistance so that he would not do anything that he would be sorry for later on" (R. 88). While he was out of the room, the witness could hear "the licks and commotion," which had ceased when he first left the room, but started again (R. 89).

6. The evidence clearly establishes that, at the time and place and under the circumstances specified, the accused officer, then acting as a military police officer in detaining and examining Private Czajkowski after arrest for being drunk and disorderly, struck the soldier a succession of blows with a club, with such force as to fracture the soldier's arm at the wrist and inflict extensive bruises upon his arm and shoulder which remained swollen and discolored the next day. The beating extended over a period of more than fifteen minutes, until the civilian chief of police, in whose police station it occurred, tactfully intervened and brought it to a close. Its severity was compared by one witness to the beating of a mule. Private Czajkowski, contentiously drunk and resentful, was somewhat impeding

the search of his person, and was cursing and reviling his captors, but was not engaged in any such resistance as to require or to excuse the use of the amount or character of force which was employed.

There was some slight effort in the evidence for the defense, wholly unconvincing, to establish a case of self-defense against anticipated attack, but even if such apprehension on the part of the accused had existed, in the police station, in the presence of a military policeman and with civil policemen nearby, it would not have excused the continued succession of blows which occurred.

As a police officer, the accused had the rightful authority to use such force as he reasonably believed to be necessary to the preservation of order and the proper control of the prisoner, but no more (Par. 22, AR 600-375, 17 May 1943). Beyond that limitation, he was fully liable and responsible for any unauthorized aggression upon the person of his prisoner (4 Amr. Jur. 52, Title "Arrest," Sec. 73).

As a military officer, he was expressly forbidden to injure those under his authority by tyrannical or capricious conduct (Par. 3, AR 600-10, 8 July 1944). Personal violence employed by an officer against a soldier has long been recognized as a serious military offense, except where circumstances may justify it as an extreme measure (Winthrop's Military Law and Precedents, Second Edition, 1920 Reprint). An assault by an officer upon an enlisted man is not an authorized means of enforcing discipline, but an offense punishable under the appropriate Articles of War (CM 238970, Hendley, 25 BR 1, 4; CM 239609, Mulroy, 25 BR 215, 218).

Upon the facts and circumstances appearing in this case, the beating inflicted by the accused upon his relatively helpless victim was not an exercise of lawful authority, but a tyrannical, oppressive and violent abuse of power such as to mark the accused as a person wholly unfit to be entrusted with authority over other men.

The intent to do bodily harm is clearly proved by inference from the character and extent of the assault, which could reasonably and foreseeably accomplish no other result.

Evidence of a blow upon the head and blows to the stomach were outside the physical area defined in the Specification, but competent as part of the res gestae and reflecting upon the issue of intent to do bodily harm.

7. The accused officer is 26 years of age, married, a resident of Meriden, Connecticut. He is a citizen by birth, of Russian parentage. After three years of high school, he was employed as sales clerk and later manager in men's clothing stores from September 1937 to June 1942. He entered the service as a Volunteer Officer Candidate and was appointed second lieutenant, Army of the United States, Air Corps,

upon completion of training at Miami Beach, Florida, 9 December 1942. He served as Croup Training Officer in superior manner and as Centralized Training Officer in excellent manner, at Miami Beach and at Amarillo. He was assigned military police duties about November 1944. He was promoted to the grade of first lieutenant 21 August 1943 and to that of captain 26 September 1944.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence of dismissal is authorized upon conviction of a violation of Article of War 93.

(Sick in quarters), Judge Advocate.

Herbert R. Frederick, Judge Advocate.

R. R. Finney, Judge Advocate.

SPJGQ-CM 277217 1st Ind

Hq ASF, JAGO, Washington 25, D. C. JUN 5 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Alfred Sherman (O-570220), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of assault with intent to do bodily harm upon the person of an enlisted man by striking him with a club, in violation of Article of War 93. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial to the confirming authority pursuant to Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. I concur in that opinion.

On the night of 13 January 1945, at Borger, Texas, the accused officer was in charge of the local military police detail. With the assistance of an enlisted military policeman, he took Private Chester Czajkowski, who had been arrested as drunk and disorderly in public at a dance hall, to the city police station. There the accused, in the presence of the enlisted military policeman and with members of the city police force nearby, questioned the inebriated soldier and tried to get him to stand at attention while the military policeman went through his pockets and took custody of his personal effects. The soldier was contentious, profane and abusive, and somewhat impeded the search, but was not violent nor belligerent. The accused procured a club made from the butt end of a billiard cue and with it beat the soldier about the arm and shoulder, for over fifteen minutes, until the local Chief of Police tactfully intervened and stopped the beating by directing that the soldier be taken to a cell. The assault resulted in a fracture of the soldier's left arm at the wrist, in addition to various bruises and contusions which required medical treatment. The facts and circumstances reveal a violent, passionate and unrestrained abuse of authority rather than any reasonable exercise thereof, clearly establish the commission by the accused of the offense alleged, and indicate his unfitness to be entrusted with authority over other men.

I recommend that the sentence be confirmed but that the forfeitures be remitted, and that the sentence as thus modified be carried into execution.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

2 Incls

(Sentence confirmed but forfeitures remitted. GCMO 310, 7 July 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGH-CM 277233

30 MAR 1945

UNITED STATES	HAMPTON ROADS PORT OF EMBARKATION
v.	Trial by G.C.M., convened at Newport News, Virginia, 12 March 1945. Dismissal, total forfeitures and confinement for three (3) years.
Second Lieutenant VIRGIL J. HOLLIS (0-1589908), Quartermaster Corps.	

OPINION of the BOARD OF REVIEW
TAPPY, GAMBRELL and TREVETHAN, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 93d Article of War

Specification: In that Second Lieutenant Virgil J. Hollis, QMC, Hampton Roads Port of Embarkation, Newport News, Virginia, did, on board the SS Abraham Lincoln, HR 195, at sea between 21 April 1944 and 21 June 1944, feloniously embezzle by fraudulently converting to his own use about $1720.00, lawful money of the United States, the property of the United States, proceeds from the sale of commissary supplies of the Army entrusted to him by the Hampton Roads Port of Embarkation Quartermaster for sale on board the said SS Abraham Lincoln, HR 195.

CHARGE II: Violation of the 61st Article of War

Specification: In that Second Lieutenant Virgil J. Hollis, * * *, did, without proper leave, absent himself from his organization at Newport News, Virginia, from about 6 January 1945 to about 8 February 1945.

He pleaded not guilty to, and was found guilty of, all Charges and Specifications. No evidence of any previous conviction was introduced. He was sentenced to dismissal, total forfeitures and confinement for five (5) years. The reviewing authority approved the sentence, but reduced the period of confinement to three (3) years, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution:

Specification of Charge I:

Accused was Transport Commander and Sales Officer of the SS "Abraham Lincoln", HR-195, which sailed from Newport News, Virginia, on 21 April 1944 (R. 5; Pros. Exs. D, E). On this voyage he carried Government commissary supplies for sale to the troops. On 19 April 1944 he signed a shipping ticket covering the transfer from the Port Quartermaster, Hampton Roads Port of Embarkation, to himself, as Sales Officer, of commissary supplies valued at $3,258.42 (R. 5; Pros. Ex. C).

It was stipulated that accused was entitled to the following credits (R. 6):

(a) $1,341.69 deposited by accused with a finance officer in New York on 21 June 1944;

(b) $168.12, representing commissary supplies turned in by accused to the Sales Officer, Water Division, New York Port of Embarkation, on 22 June 1944; and

(c) $28.61, representing an authorized allowance to accused of 1% on sales made by him.

The total of these three credits is $1,538.42, leaving an unaccounted for balance of $1,720. Up until 6 March 1945 accused had not rendered any accounting of his transactions as Sales Officer on this voyage of the HR-195 (R. 17).

In a pre-trial statement, voluntarily made by accused to an officer of the Inspector General's Department on 22 February 1945, accused stated that when he returned from his voyage on the HR-195 he was "worried" and was not able to "settle up the PX account." He estimated that he owed the Government roughly $1650. He had no explanation of the loss of this amount of money. With respect to his obligation to make an accounting of his transactions as Sales Officer he said "When we come to Port we settle our account right away. I couldn't settle mine up. I didn't tell them I could not and I did not tell them that I had" (R. 14). He admitted, however, that upon his return from the voyage he received the following instructions

from Lieutenant Huckemeyer "You report to MI, you settle up your account, and come back here, and we will see about a leave" (R. 15). In response to a question as to his intentions respecting repayment of the money he was short, accused replied "I don't know, sir. I cannot get any money from the outside. My mother does not have any. The only way I could pay it would be from my salary" (R. 15).

Specification of Charge II:

Proof of accused's initial absence without leave on 6 January 1945 was established by the introduction of a certified extract copy of his organization's morning report (R. 4; Pros. Ex. A). Accused's return to military control on 6 February 1945 at Wendover Field, Utah, was proved by the introduction of a certified extract copy of the morning report of the guardhouse at that station (R. 4; Pros. Ex. B).

In his pre-trial statement accused admitted that he left his organization on 6 January 1945, and stated that he went to Richmond, California, to visit his mother. Explaining why he left, he said the reason lay in "the circumstances in the PX account. I still had it on my mind. I was $1650.00 short in the PX account and could not make it up to the Government" (R. 14). Later in the same statement he said (R. 16):

> "I know there should have been a reason but I have no excuse. It only looked to me that when everything was so black I did not care. I returned to the States on the 21st of December. This investigation took place right after that. I received a letter from my wife requesting a divorce. I couldn't get leave on account of the investigation. On the 3d, receiving a telegram that my brother was killed in action in France. My sister sent the letter. Everything looked so darn dark and everything. I don't know. I just went berserk. I have no excuse for what I have done. I am not using that for an out. I just can't understand myself."

It was stipulated that subsequently to 6 March 1945 accused paid the sum of $1720 to the Treasurer of the United States and that this payment extinguished accused's "responsibility on the sales commissary account of the SS Abraham Lincoln, HR 195" (R. 19).

4. Evidence for the defense:

No witnesses were called by the defense.

After having his rights as a witness explained to him by the court, accused elected to make an unsworn statement through his counsel, the substance of which was the following:

Accused voluntarily entered the Army of the United States on 4 April 1941. He rose to the rank of sergeant and was awarded the good conduct ribbon. He attended the Quartermaster OCS and was commissioned a second lieutenant on 4 March 1943. Subsequently he served three months in an ordnance camp in Texas, and was then transferred to the Hampton Roads Port of Embarkation where he was a member of the Ships Complement until 21 December 1944. During his period of service with the Hampton Roads Port of Embarkation he made six voyages as Transport Commander and Cargo Security Officer. There has never been one suspicion of wrong on his record either as an enlisted man or as an officer. His mother is living. He is married and has a daughter 2½ years old. He has two married sisters and he had two brothers. One brother, a sergeant in the engineer corps, was killed in action in France on 4 December 1944. The other brother is in the service and is now stationed at Madison, Wisconsin (R. 20).

It was stipulated that accused received a telegram from one of his sisters on or about 3 January 1945 stating that his brother had been killed in action in France and that his mother was ill (R. 19).

5. The Specification of Charge I alleges the offense of embezzlement, in violation of the 93d Article of War. All of the elements of the offense alleged are fully established by the evidence. It is undisputed that on or about 19 April 1944 Government commissary supplies of the value of $3,258.42 were entrusted to accused, as Sales Officer of the SS "Abraham Lincoln", HR-195, by the Port Quartermaster, Hampton Roads Port of Embarkation; that on or about 21 June 1944, following his return from his voyage on the HR-195, accused turned in to the Government cash in the amount of $1,341.69 and commissary supplies in the amount of $168.12; that he was entitled to a selling commission credit in the amount of $28.61; and that up until 6 March 1945 accused had not accounted for the balance of $1720 with which he was charged, although an accounting was due in June 1944.

As Sales Officer on an Army Transport the accused had full accounting responsibility in respect of the commissary supplies entrusted to him (AR 55-450, par. 10a (2); AR 35-6660; Cir. 281, WD, 22 August 1942). Accused did not deny knowledge of his accounting responsibility. On the contrary, the evidence conclusively shows that he was well aware of this responsibility.

The Manual for Courts-Martial, 1928, provides:

"Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted or into whose

hands it has lawfully come. (Moore v. U.S., 160 U.S. 268.)

"The gist of the offense is a breach of trust. The trust is one arising from some fiduciary relationship existing between the owner and the person converting the property, and springing from an agreement, expressed or implied, or arising by operation of law. The offense exists only where the property has been taken or received by virtue of such relationship" (par. 149h).

Under the circumstances shown by the evidence the court was warranted in inferring that the shortage resulted from fraudulent misappropriation by the accused:

"Any adult man who receives large sums of money from others for which he is responsible and accountable, who wholly fails either to account for or to turn them over when his stewardship terminates, cannot complain if the natural presumption that he has spent them outweighs any explanation he may give, however plausible, uncorroborated by other evidence. C.M. 123488 (1918); 203849 (1935)." (Dig. Op. JAG, 1912-40, sec. 451 (17)).

To the same effect are numerous other decision (CM 204879, Fleischer, 8 B.R. 121; CM 254879, Kelly, 35 B.R. 387). Accused, in the present case, proffered no explanation as to the cause of his shortage.

The fact that the accused has subsequently made complete restitution to the Government of the funds embezzled supplies no defense:

"The return of the amount of the fund post litem motam is of no probative value, except as an admission that he was responsible for it. It does not tend either to negative or to excuse the offense charged. C.M. 123492" (Dig. Op. JAG, 1912-40, sec. 451 (17)).

The Board of Review is of the opinion, therefore, that the court's finding of guilty of the offense alleged, in violation of the 93rd Article of War, is amply supported by the record of trial.

6. The absence without leave alleged in the Specification of Charge II is likewise fully established by the evidence. The court could not reasonably have made any other finding than that of guilty.

7. The records of the War Department show that accused is 27½ years of age and married. He attended high school four years, and from October 1937 until March 1941 held minor clerical jobs with five different concerns. He enlisted in the Army in April 1941, rose to

the rank of sergeant, attended the Quartermaster Officer Candidate School and was commissioned a second lieutenant on 2 April 1943.

8. The court was legally constituted and had jurisdiction over the accused and the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The sentence imposed by the court is authorized upon a conviction of a violation of either Article of War 93 or Article of War 61.

Thomas N. Jaffy, Judge Advocate

William H. Bambrell, Judge Advocate

Robert C. Trevellian, Judge Advocate

SPJGH -CM 277233 1st Ind

Hq ASF, JAGO, Washington 25, D.C.

TO: The Secretary of War

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Virgil J. Hollis (0-1589908), Quartermaster Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. There appear to be no mitigating or extenuating circumstances. I recommend that the sentence, as approved by the reviewing authority, be confirmed, but that the forfeitures be remitted and that the sentence as thus modified be carried into execution. I further recommend that the United States Penitentiary, Lewisburg, Pennsylvania, be designated as the place of confinement.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

3 Incls.
1. Record of trial
2. Dft for sig S/W
3. Form of Action

(Sentence as approved by reviewing authority confirmed, but forfeitures remitted. GCMO 189, 9 June 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGK - CM 277286

30 MAR 1945

UNITED STATES	FORT LEWIS, WASHINGTON
v.	Trial by G.C.M., convened at Fort Lewis, Washington, 1 March 1945. Dismissal, total forfeitures, and confinement for six (6) years.
Second Lieutenant LOREN H. SELLECK (O-553749), Corps of Engineers.	

OPINION of the BOARD OF REVIEW
LYON, HEPBURN and MOYSE, Judge Advocates.

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1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. Accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Loren H. Selleck, Second Lieutenant, Corps of Engineers, Headquarters, 14th Engineer Training Group, did, at Fort Lewis, Washington, on or about 3 January 1945, wrongfully purchase 110 cartons of cigarettes from the Fort Lewis Exchange by falsely representing to Peter Corke, an employee of the Fort Lewis Exchange, that said cigarettes were intended for the use of the 3064th Engineer Dump Truck Company, the said Second Lieutenant Loren H. Selleck then and there knowing said representations were false.

Specifications 2, 3, 4, and 5 are identical in form with Specification 1 except as to the date of the purchase, the quantity of cigarettes purchased, and the name of the Exchange employee. These differences were as follows:

Specification 2:	8 January 1945	180 cartons	O. C. Wright
Specification 3:	15 January 1945	180 cartons	Peter Corke
Specification 4:	27 January 1945	240 cartons	Peter Corke
Specification 5:	4 February 1945	120 cartons	Lester U. Satterlee

Specification 6: In that Loren H. Selleck, * * *, having purchased 110 cartons of cigarettes from the Fort Lewis Exchange, did at Fort Lewis, Washington, on or about 3 January 1945,

wrongfully and knowingly resell the same.

Specifications 7, 8 and 9 are identical in form with Specification 6 except as to the quantity of cigarettes resold and the dates, which differences were:

Specification 7: 180 cartons, 8 January 1945
Specification 8: 180 cartons, 15 January 1945.
Specification 9: 240 Cartons, 27 January 1945.

He pleaded not guilty to and was found guilty of the Charge and all of the specifications. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a period of six years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence.

a. For the prosecution.

The accused at the time of trial was in the military service of the United States (R. 8). From about 25 October 1944 to 27 January 1945, Sergeant Charles E. Rose (colored) was assigned to duty with the 3064th Dump Truck Company stationed at Fort Lewis, Washington. The accused was an officer of that organization. On or about 3 January 1945, Rose was talking to the accused. Both expressed their need of money. Rose said he could dispose of some cigarettes if the accused could obtain them from the "P.X." (R. 34). They thereupon agreed that if the accused would purchase cigarettes from the Post Exchange with his own money, Rose would sell the cigarettes in civilian markets, and the two would equally divide the profits. In accordance with the arrangement, accused, accompanied by Rose, went to the Fort Lewis Post Exchange, known as Beer Hall Number 1, and purchased 110 cartons of cigarettes for $132.00. In doing so accused represented that he wanted the cigarettes for the members of 3064th Dump Truck Company on bivouac. Rose signed the sales ticket at the accused's request. The cigarettes were carried to the company area by truck. Rose removed them to his own car and sold them to civilians in Tacoma, Washington, for $2.00 per carton. He refunded the purchase price to accused and divided the resulting profit so that each received $41 profit (R. 35-36).

On or about 8 January 1945, the accused purchased, under the same arrangement, 180 cartons of cigarettes at the same Post Exchange for $216.00. Rose sold these cigarettes in Tacoma to civilians for $2.00 per carton and divided the profits with the accused (R. 37-38).

On or about 15 January 1945, the accused again, under the same arrangement, purchased 180 cartons of cigarettes for the same price and

at the same place. Again, Rose sold them to civilians for $2.00 per carton in Tacoma and divided the profits with accused (R. 38-39).

On 27 January 1945, the accused and Rose agreed to amend the terms of their previous agreement concerning the purchase of cigarettes. It was agreed that Rose would pay accused $90 if he would purchase for him four cases (240 cartons) of cigarettes. In accordance with this arrangement Rose gave the accused the money with which to purchase the cigarettes and accused purchased the four cases at the same Exchange and delivered them to Rose. Rose took them to Tacoma where he sold them to civilians (R. 39-40).

On 4 February 1945, Rose was arrested by Lieutenant L. S. Brooke, Chief of the Investigation Branch, Security and Intelligence Division, Fort Lewis, Washington, in connection with the sale of a case of whiskey. Upon questioning Rose, it was learned that he had been selling cigarettes obtained at the Fort Lewis Post Exchange through the accused (R. 40,44). At the instance of Lieutenant Brooke, Rose telephoned the accused and arranged to give him the case of whiskey in lieu of the $90 which he owed him on the transaction of 27 January 1945, and at the same time he requested accused to purchase for him two more cases of cigarettes. Rose drove to an appointed place and delivered the case of liquor, marked for identification by Lieutenant Brooke, to the accused by placing it in the trunk compartment of accused's car. Rose then gave accused $156 in cash, which had been supplied him by Lieutenant Brooke, with which to purchase the cigarettes. Accused went to the Post Exchange and returned with the two cases (120 cartons) of cigarettes. The two drove separately out of the Camp a short distance and, as accused was transferring the cases of cigarettes to Rose's car from his own car, he was arrested by Lieutenant Brooke who had followed Rose from the beginning to observe the transaction (R. 41-42,44-48). The marked case of whiskey was found in accused's car at that time (R. 48). The money supplied for the purchase of the cigarettes was traced to the till of the Post Exchange by the serial numbers on the bills (R. 19-20, 48-49).

Peter Corke, Supervisor of Maintenance for Fort Lewis Post Exchange, O. C. Wright, the manager, and Lester U. Satterlee, the assistant manager, testified that on 3, 8, 15 and 27 January 1945, and 4 February 1945, the accused came into Number 1 Beer Store of the Fort Lewis Exchange and, by representing that he was purchasing cigarettes for the 3064th Engineer Dump Truck Company on bivouac (R. 18,25,29), purchased 110 cartons, 180 cartons, 180 cartons, 240 cartons, and 120 cartons of cigarettes, respectively, on the dates mentioned and paid in cash for each lot the respective sums of $132, $216, $216, $312, and $156. At the time of each purchase, a bill of sale was given to the accused, a copy of which was retained, showing the sale of the cigarettes to the 3064th Engineer Dump Truck Company (Exs. 1, 2, 3, 4 and 5). Rose was present during the first three sales and receipted for the cigarettes. Accused receipted for them on 27 January 1945. No one signed the receipt for the cigarettes on 4 February 1945.

Mr. Corke testified that cigarettes were "highly allocated merchandise"; that he had the authority to sell a limited amount to commissioned officers who might purchase them for an organization on bivouac or about to travel (R. 9,21-22); no one else would be permitted to purchase cigarettes in such quantities (R. 23); individuals were limited to two packages of cigarettes; and no officer could have purchased more than two packs unless he was buying for an organization (R. 23-24). All of the sales of cigarettes that were made to the accused were made to him as a representative of the 3064th Engineer Dump Truck Company, represented to be on bivouac, as shown by all of the sales slips (R. 16, Exs. 1 to 5, incl., R. 25,29).

On 4 February 1945, after several hours of questioning by Lieutenant Brooke and by Lieutenant Colonel Gaines, the staff judge advocate, and, after having been warned of his right to remain silent and his rights under the 24th Article of War (R. 49, 52-53), the accused orally confessed that he was the Supply Officer and 2nd Platoon Commander of the 3064th Engineer Dump Truck Company and had been such since 25 October 1944. Sergeant Rose was the First Sergeant. In early January, Rose requested the accused to purchase cigarettes at the Exchange for him, stating that he (Rose) would sell them and pay the accused for purchasing them. In accordance with this arrangement the accused purchased at the Fort Lewis Post Exchange (No. 1 Beer Store) (1) 110 cartons of cigarettes on 3 January 1945 for $132.00, as shown by the sales slip (Ex. 1), for which he was paid $18 by Rose above the cost; (2) 180 cartons of cigarettes on 8 January 1945 for $216, as shown by the sales slip (Ex. 4), for which he received a profit but could not recall the amount; (3) 180 cartons of cigarettes on 15 January 1945 for $216, as shown by the sales slip (Ex. 2), for which he also received a profit but could not recall the amount; (4) 240 cartons of cigarettes on 27 January 1945 for $312, as shown by the sales slip (Ex. 3), for which he was to receive $78 profit after Rose had sold the cigarettes, which profit he had not as yet received, and (5) 120 cartons of cigarettes on 4 February 1945 for $156, as shown by the sales slip (Ex. 5), purchased for Rose with money supplied by Rose and concerning which no agreement was made as to the amount of the profit to be paid him by Rose. All of the above purchases were made by the accused in the name of his organization, but none of the cigarettes were ever turned over to the organization. They were all turned over to Rose except one case of the last purchase - it was intercepted during delivery by Lieutenant Brooke. The accused's statements were typed as he made them and he voluntarily signed the stenographic record of them (R. 50, Ex. 6).

b. For the defense.

The accused, at his own request, was sworn and testified that he was 22 years of age and had been commissioned a second lieutenant on 28 June 1944. Prior to his entry in the service, he was a student in mechanical engineering at the Missouri School of Mines, Rolla, Missouri. With reference to the charges against him, he stated (R. 57):

"Well, I made a mistake which I know that I shouldn't have done now and I didn't intend to take anything away from any other soldier because that isn't my idea because I know we are all in this together and I wanted to do what I could. I thought I was until I made this mistake and I hope I get one more chance because I know I will never do it again. I have never done it before and I never will again.

* * * *

"I can't explain it."

4. Discussion.

a. Specifications 1 to 5 inclusive.

The evidence clearly established that the accused did on the dates and in the quantities alleged in the specifications purchase cartons of cigarettes from the Fort Lewis Post Exchange by falsely representing to the employees of that exchange that the cigarettes were intended for the use of the 3064th Engineer Dump Truck Company, knowing that this representation was false. The only question remaining for determination with reference to these specifications is whether such purchases were "wrongful", as alleged, and therefore constituted a violation of the 96th Article of War.

It was clearly shown that due to the shortage of cigarettes the Exchange permitted the purchase of no more than two packs of cigarettes by any one person, except where an officer was purchasing cigarettes for an organization about to travel or on bivouac. The accused, being fully aware of this practice, deceived the employees of the Exchange into selling him large quantities of cigarettes by pretending that he was purchasing them for his organization on bivouac. In this manner, he gained an advantage over his fellow officers and other military personnel at that post. Such conduct was clearly prejudicial to good order and military discipline. The smoking of cigarettes has become so universal that the lack of cigarettes in a military organization might well affect its morale and its discipline, particularly if that shortage were accentuated by such gross abuses of the purchasing privilege. We find no hesitancy in agreeing with the court that the accused's acts, as alleged in these specifications (1 to 5) were wrongful and that they did violate the 96th Article of War.

With reference, however, to Specification 5 (the purchase made 4 Feb. 1945) it may be argued that the finding of guilty should not be sustained because the accused was entrapped into making this purchase at the instance of Lieutenant L. S. Brooke, Chief of the Investigating Branch, Security and Intelligence Division, ASFTC, Fort Lewis, Washington. It is true that he and Sergeant Rose planned to have the accused purchase the cigarettes on that date, asked him to do it, and provided him with marked money for that purpose.

The doctrine of entrapment is invoked as a matter of public policy. The rule has been stated as follows:

> "Where the defendant, otherwise innocent, is induced and lured into the commission of the offense, entrapment constitutes a complete defense, on the grounds of public policy" (CM 211557, 10 B.R. 71,92, and authorities therein cited).

and

> "The conviction by a court-martial of a soldier, not engaged in criminal practices, who is incited and lured into the commission of a criminal offense by a military police officer * * * or other agents of the Government, is contrary to public policy and that such inducement is fatal to the record." (Dig. Op. JAG 1912-1940, par. 395 (35), underscoring supplied.)

In the instant case the accused had been engaged in the wrongful and unlawful practice of purchasing and selling cigarettes contrary to Army Regulations. The investigating officer was justified in adopting the methods that he used in order to satisfy himself and conclusively prove that Rose's then uncorroborated story was true. The doctrine of entrapment under the circumstances appearing in this case may not successfully be invoked by the accused. (See also CM 187319, 1 B.R. 29; CM 236937, 23 B.R. 184; Section 390 of Wharton's Criminal Law, 12th Ed.)

b. Specifications 6 to 9.

It was also clearly shown by the uncontradicted evidence that the accused did on 3, 8, and 15 January resell, through his arrangement with Sergeant Rose, the various lots of cartons of cigarettes purchased by him on those dates, at or near Fort Lewis, Washington, as alleged in Specifications 6, 7 and 8. His act of reselling goods purchased at a Post Exchange was wrongful in that it was a clear violation of Army Regulations (AR 210-65, 13d), which prohibits the resale of merchandise purchased in an Army Exchange. The actual resale was made by Rose, but the accused was a party to the arrangement and profited by the sale. In effecting the sales of the cigarettes for $2.00 per carton to civilians in Tacoma, Rose was acting for the accused as well as for himself and the accused was therefore criminally responsible for Rose's acts.

A violation of a War Department Army Regulation of this nature automatically constitutes a violation of the 96th Article of War. Such conduct is prejudicial to good order and military discipline.

With reference to Specification 9, the conviction should not be sustained. The 240 cartons of cigarettes purchased by the accused on 27 January 1945 were not resold by the accused. The evidence was clear that

the accused purchased these cigarettes for Sergeant Rose with money provided by Rose under an arrangement whereby the accused was acting as Rose's agent in the purchase of the cigarettes and had no interest in their resale. The only offense involved was the wrongful purchase of the cigarettes, which offense is covered by Specification 4 of the Charge.

5. War Department records show the accused will be 23 years of age on 29 July 1945. He is single and his home address is Kansas City, Missouri. After graduating from high school, he attended the Missouri School of Mines for 2-1/2 years, majoring in Mechanical Engineering. He successfully completed two years of R.O.T.C. Engineer Training at college, attended O.C.S., and on 28 June 1944 was commissioned second lieutenant, Engineer-Reserve, A.U.S., at Fort Belvoir, Virginia. He successfully completed the eight-week Ordnance Automotive Maintenance Course at Aberdeen Proving Grounds, and was then assigned to duty at Fort Leonard Wood, and shortly thereafter at Fort Lewis.

6. The court was legally constituted and had jurisdiction over the accused and the offenses. Except as herein noted, no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is not legally sufficient to support the finding of guilty of Specification 9 of the Charge, but is legally sufficient to support the findings of guilty of the Charge and the remaining specifications and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

(Sick in Quarters), Judge Advocate.

Carle Deblum, Judge Advocate.

Hermann Mayer, Judge Advocate.

SPJGK - CM 277286 1st Ind.

Hq ASF, JAGO, Washington 25, D. C. APR 9 1945

TO: The Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Loren H. Selleck (0-553749), Corps of Engineers.

2. I concur in the opinion of the Board of Review that the record of trial is not legally sufficient to support the finding of guilty of Specification 9 of the Charge, but is legally sufficient to support the findings of guilty of the Charge and the remaining specifications and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the forfeitures be remitted; that the period of confinement be reduced to two years; that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement, and that the sentence as thus modified be carried into execution.

3. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

3 Incls
1. Record of trial
2. Drft ltr sig S/W
3. Form Ex action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Findings disapproved in part. Sentence confirmed but forfeitures remitted, confinement reduced to two years. GCMO 226, 13 June 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGN-CM 277450

UNITED STATES	)	FIRST AIR FORCE
v.	)	Trial by G.C.M., convened at Army Air Base, Mitchel Field, New York, 16 March 1945. Dismissal.
Second Lieutenant JAMES R. HALL, Jr. (0-2063025), Air Corps.	)	

OPINION of the BOARD OF REVIEW
LIPSCOMB, O'CONNOR and MORGAN, Judge Advocates

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1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 61st Article of War.

Specification: In that Second Lieutenant James R. Hall, Jr., Air Corps Unassigned, attached to Squadron T (Combat Crews), 110th AAF Base Unit (Staging), did, without proper leave, absent himself from his station at Mitchel Field from about 0815, 24 February 1945, to about 2030, 24 February 1945.

CHARGE II: Violation of the 96th Article of War.

Specification: In that Second Lieutenant James R. Hall, Jr., Air Corps Unassigned, attached to Squadron T (Combat Crews), 110th AAF Base Unit (Staging), having been restricted to the limits of Mitchel Field, New York, did, at Mitchel Field, New York, on or about 24 February 1945, break said restriction by going to Garden City, New York.

He pleaded guilty to, and was found guilty of, the Charges and the Specifications. Evidence of a previous conviction by general court-martial of absence without leave for five days was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years. The reviewing authority approved the sentence but remitted the forfeitures and confinement, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution: The accused was the co-pilot of a bomber crew attached to a staging unit at Mitchel Field, New York (R. 11-12; Pros. Ex. 3). Effective at 1200, 23 February 1945, the crew was alerted and restricted to the limits of Mitchel Field, pending departure sometime after 1000 on the following day for Fort Totten, New York, an aerial port of embarkation (R. 13; Pros. Exs. 3, 4). The accused was fully aware of the restriction (R. 15-16; Pros. Ex. 5). However, he did not report for duty on the morning of 24 February 1945 and was dropped on the morning report, "AWOL as of 0815" (R. 9; Pros. Ex. 1). Searches made of accused's barrack and the surrounding area at the time and at subsequent intervals during the morning failed to disclose his presence (R. 9-10). His crew departed from Mitchel Field at 1300 after a replacement had been procured (R. 12-13). Accused returned to duty about 2030 the same day (Pros. Ex. 1). When subsequently interviewed by the investigating officer in the case, accused, after being warned of his rights, admitted that he had breached his restriction to limits and had absented himself without leave as alleged in the Specifications (Pros. Ex. 5).

4. Evidence for the defense: Accused, cognizant of his rights, was sworn as a witness (R. 16-17). He testified that he had served as an enlisted man from 20 March 1942 to 27 June 1944, and that his highest enlisted grade was that of corporal (R. 20-21). He had been stationed at Mitchel Field since 2 February 1945 (R. 24).

On the day on which they were alerted, that is, 23 February 1945, accused and some other officers had "a little party" in their barracks. They commenced drinking in the afternoon and continued until about 2230. Becoming "slightly stimulated" from the effects of the intoxicants accused "got the idea" of going to town. He left the field about 2300 and took the bus into Hempstead (R. 17, 20, 23). In the company of two enlisted men from the field and a civilian he continued his drinking in various bars. He accepted the civilian's invitation to go to the latter's house for a drink and while there he fell asleep. He awakened at about 1800 the next afternoon and returned immediately to Mitchel Field (R. 18). He spoke to an officer about rejoining his crew, which he "knew" was still at Fort Totten, but received no encouragement (R. 19).

Accused asserted that he had "gone through the complete line of processing", and was all packed and ready to go when he commenced to drink (R. 19-20). He knew at the time he left the field that he was breaking

restrictions and he wouldn't have done so except for his drinking (R. 18). Accused admitted a previous conviction while at Langley Field, Virginia, for an absence without leave of five days. He stated that this absence resulted from overstaying an emergency leave when his sister was very ill and in danger of death (R. 18-19).

5. The court announced that it would take judicial notice "that a bus traveling to Hempstead must proceed through Garden City" (R. 23).

6. It is alleged under Charge I that accused absented himself without leave from his station at Mitchel Field from 0815 to 2030 on 24 February 1945, in violation of Article of War 61, and under Charge II that he broke restriction to the limits of Mitchel Field on the same date by going to Garden City, New York, in violation of Article of War 96.

The commission of the offenses is established by the evidence for the prosecution and admitted by the pleas of guilty and the testimony of accused. After the bomber crew of which accused was a member had been alerted and restricted to the limits of Mitchel Field pending transfer to an aerial port of embarkation, accused broke the restriction and absented himself without leave. By the time he returned to camp the crew had departed. Although his absence was of limited duration, being less than a day, it was necessarily serious in character under the circumstances. Accused blamed his misadventures on "the demon rum" and asserted that he would not have left the field except for the fact that he was celebrating his departure with some other officers on the field and drank to such excess that his judgment was impaired. This explanation is of no legal validity and is pertinent only as a possible extenuating factor.

7. The accused was born 7 July 1921 and is, therefore, about 23 years and 9 months of age. War Department records show that he is a native of Detroit, Michigan, and unmarried. He is a high school graduate and during his service in the Army studied engineering at DePaul University, Chicago, Illinois, for part of a year as an "ASTP" student. From 1940 to 1942 he was employed as a test driver of trucks for General Motors Corporation at Pontiac, Michigan. He entered the Army in March of 1942 and subsequently trained as an aviation cadet. He was eliminated about 19 December 1942 because he overstayed a leave of absence and was absent without leave for 36 hours. He was permitted to renew his cadet training on 30 December 1943 and upon completion thereof received a temporary commission as a second lieutenant in the Army of the United States and entered upon active duty on 27 June 1944.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence

and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of the 61st or of the 96th Article of War.

Abner E. Lipscomb, Judge Advocate.

Robert J. Harmon, Judge Advocate.

Samuel Morgan, Judge Advocate.

Hq ASF, JAGO, Washington 25, D.C.

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant James R. Hall, Jr. (0-2063025), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to, and was found guilty of, absenting himself without leave from 0815 to 2030 on 24 February 1945, in violation of Article of War 61; and of breach of restriction on the same date, in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years. The reviewing authority approved the sentence but remitted the forfeitures and confinement, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority and to warrant confirmation thereof.

Accused was a member of a bomber crew attached to a staging unit at Mitchel Field, New York, pending transfer to an aerial port of embarkation. After the crew had been alerted and restricted to the field preparatory to departure, accused breached the restriction and absented himself without leave from the field for several hours. During his absence the crew left. His only explanation for his actions was that he was celebrating his departure and became intoxicated. This is not the first occasion that accused has been derelict in his duty. In December 1942 accused was temporarily eliminated from training as an aviation cadet by reason of absence without leave for 36 hours. He received punishment under Article of War 104 in November 1944, for being drunk and disorderly in uniform. In January 1945 he was convicted by general court-martial at Langley Field, Virginia, of absence without leave for five days and was sentenced to a forfeiture of pay. These circumstances indicate that accused lacks that stability and sense of responsibility which are requisite in an officer.

I recommend that the sentence as approved by the reviewing authority be confirmed and ordered executed.

4. Consideration has been given to a letter from the mother of accused addressed to the reviewing authority and forwarded by him to this office.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

3 Incls
Incl 1 - Record of trial
Incl 2 - Form of action
Incl 3 - Ltr. fr. mother of accused

(Sentence as approved by reviewing authority confirmed. GCMO 237, 19 June 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGQ
CM 277458

UNITED STATES v. First Lieutenant JAMES J. PATNODE (0-1177931), Quartermaster Corps.	THIRD SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort George G. Meade, Maryland, 12 March 1945. Dismissal.

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OPINION of the BOARD OF REVIEW
ANDREWS, FREDERICK and BIERER, Judge Advocates.

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1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 95th Article of War.

Specification: In that First Lieutenant JAMES J. PATNODE, QMC, 22nd Quartermaster Training Company, First Training Group, ASFTC, Camp Lee, Virginia, now on temporary duty at Fort George G. Meade, Maryland, well knowing that Private First Class Malcolm C. Douglass, a former enlisted man of his command had formed a sentimental attachment towards and had expressed his willingness to pay up to three hundred dollars ($300.00) for a certain Malamute sled dog named "Lucky", did at Camp Rimini, Helena, Montana, while stationed there as Canine Director in charge of training of dogs, on or about 1 July 1944, assist Audrey D. Roe (now Audrey D. Patnode) in the selection and purchase of said dog for seven dollars and fifty cents ($7.50) and after such dog had been purchased by the said Audrey D. Roe (now Audrey D. Patnode) from the United States Treasury Department, the said First Lieutenant James J. Patnode, without disclosing the facts of said purchase to the said Private First Class Malcolm C. Douglass, did, wrongfully arrange and consummate an unconscionable sale of the said dog to the said Private First Class Malcolm C. Douglass for three hundred dollars ($300.00), which is conduct unbecoming an officer and a gentleman.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was submitted. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution was substantially as follows:

Private First Class Malcolm C. Douglass, Cold Weather Testing Detachment, Army Air Forces Proving Ground Command (R. 6), had, in civil life, been a member of the United States Antarctic Service Expedition of 1939-1941, under Admiral Byrd, as a dog-team driver and meteorologist. In Little America, an Eskimo Malamute puppy was born, during a severe storm in the winter night, which was named "Lucky" as a comment upon his survival. As a puppy, Lucky sustained an injury to his forelegs, both of which were broken in falling into a deep pit, which left his forelegs badly bent and incapacitated him as a sled dog. By reason of his beautiful markings and other attractions, he was kept alive, nursed back to health, and kept as a pet of the Expedition (R. 7).

Private First Class Douglass, after his entry into the Army, discovered Lucky at the Army Ski Troop Camp, Camp Hale, Colorado, and the soldier and the dog were transferred to Camp Rimini, Helena, Montana (R. 7). There Douglass served as a dog team driver under the immediate command of the accused, who had charge of the sled dog department (R. 6). With the knowledge and approval of the accused, Douglass made Army-sponsored public appearances in which he lectured on the Antarctic Expedition and took Lucky about with him as an exhibit (R. 7).

Douglass was fond of the dog, and so advised the accused on several occasions (R. 7). In the Spring of 1944, the accused suggested to Douglass something about having to kill Lucky, as having been inspected and found useless. Douglass protested, saying that any member of the Expedition would give a lot to own Lucky, and that he himself would pay three or four hundred dollars for him. A discussion ensued in which the accused said that the only way Douglass could get the dog would be at an auction when the Army sold worthless dogs, and that no date had been set for such an auction. Douglass was expecting transfer, and asked whether someone could represent him and bid on his behalf if the auction occurred in his absence. The accused "supposed" that Douglass could get someone to do that. Douglass said that the address of his brother was on file in the office, and that his brother would pay for the dog and would know where to reach him if the accused could not do so. The accused said, "Well, we'll do that then" (R. 8). The accused said that he could not buy the dog for Douglass (R. 11), but stated or implied that he

could get someone to bid for Douglass if there was not time for Douglass' brother to get there (R. 12).

Douglass was transferred to stations in Oregon and thence to Fort Ord, California. He wrote a letter to the accused (R. 8), to confirm the previous conversation and ask the accused to remember to notify Douglass or Douglass' brother so that Douglass could buy Lucky in case of an auction (R. 8, 9). Douglass also wrote to Captain Smith, the veterinarian at Camp Rimini (R. 8), expressing his interest in the dog (R. 9).

About 4 July 1944, at Fort Ord, California, Douglass received a telegram from the accused, dated 3 July 1944 (R. 9; Ex. A), saying:

> "HAVE PURCHASED BOTH TUCKY AND GERT WILL HOLD FOR TWO DAYS BOTH CAN BE SOLD LOCALLY ARE YOU INTERESTED WIRE PRICE YOU WILL PAY."

Douglass replied by telegram and letter to the accused, that he definitely wished to buy the dog and was willing to pay up to $300 for him at the auction (R. 9). He wired his home in New Jersey to arrange for payment and to receive the dog. In view of his previous conversations with the accused, Douglass was confused by the words "have purchased" in the accused's telegram, and, although they were confirmed by Western Union, Douglass thought there must be an error and that the meaning was "can purchase", or "you can purchase", and that the supposed auction was still to be held (R. 12). He told the accused in his letter that the $300 was meant as his top price, and he did not want to pay more than he had to (R. 13).

Douglass received a second telegram from the accused (R. 10; Ex. B), dated 8 July 1944, which read:

> "LUCKY TO BE SENT TO(NEW)JERSEY POSTPAID UPON RECEIPT OF $300. CAMP INACTIVE. CAMP (CAPT.) SMITH NO LONGER AT THIS STATION. MUST DISPOSE OF DOG IMMEDIATELY."

Douglass' recollection was that he then wired the accused to say that he was arranging for the money through his home, which would take a few days (R. 10). He received a third wire from the accused, dated 18 July 1944 (R. 10; Ex. C), saying:

> "LUCKY BEING HELD BY FRANCIER WILL LOSE DOG 22 JULY 44. CAN YOU SEND MONEY IMMEDIATELY."

on 22 July 1944 he meant that if Douglass did not want the dog, Miss Roe would not hold it any longer. She would sell it to somebody else; whoever wanted it (Ex. D, p. 11). The accused received no letter from Douglass, but read the letter which Douglass wrote to Captain Smith (Ex. E, p. 2). Douglass had said in his letter to Captain Smith that he would pay two or three hundred dollars for Lucky, but if he would do it remained to be seen. Accused was surprised that he would, as it did not seem right (Ex. D, p. 8-9). The accused never thought about telling Douglass how much had been paid for the dog at the sale (Ex. E, p. 7). Miss Roe made her own contacts and sales of the other dogs which she bought, except one which the accused sold for her for $12.50. Some of her sales were to soldiers transferred from Camp Rimini, whom both she and the accused knew as dog fanciers. Miss Roe had been employed at Camp Rimini (Ex. D, p. 5-6).

On 5 March 1945, the day he made his statement to the officer investigating the charges, accused offered to reimburse Douglass whatever amount Douglass thought he had overpaid (Ex. E, p. 9).

4. The accused testified (R. 17), generally in accord with his previous statements (R. 17-31). He did not feel that he was acting as Miss Roe's agent in sending the telegrams to Douglass, but sent them at her request. He would have done the same for anybody else. He did not feel obligated to tell Douglass the circumstances. He did not anticipate nor receive profit from the transaction (R. 18, 19). He received the $300 from Douglass, turned it over to Miss Roe, and took her receipt for it (R. 18; Ex. I). Miss Roe paid for the telegrams. Accused did not become engaged to marry her until about six weeks later. Douglass knew that no one in the service could buy a dog or other government property at any auction, through himself or a second party (R. 19). Accused received no communication from Douglass until after the sale. Accused saw the letter Douglass wrote to Captain Smith, but so did Miss Roe and others, who knew about Douglass and his offer (R. 20). Miss Roe paid $7.50 each for the thirteen dogs she bought. The highest price at the sale, of one hundred four dogs, was $18.50, which was paid for a female with puppies (R. 21). The accused received a telegram from Douglass, in response to his own wire, which read:

> "WIRED BROTHER. ANTICIPATE HE SENDING MY FUNDS. HIS ADDRESS: FIFTY-FOUR NEWMAN AVENUE, VERONA, NEW JERSEY WHERE LUCKY GOES. LETTER ASKS IF EXHORBITANT PRICE LEGALLY NECESSARY. IS RIMINI IN DEBT? GOOD THING I DIDN'T SET THOUSAND AS TOP PRICE."

Accused saw nothing in that telegram to raise any question about the transaction. (R. 26). He was not concerned with nor interested in Douglass (R. 30). Miss Roe sold ten of the thirteen

dogs she bought, but made a profit only on two. She wanted to make the ones she sold pay for the ones she kept (R. 30).

The defense introduced no other evidence.

5. The evidence fully establishes the facts that at the place and time and under the circumstances alleged, the accused assisted Miss Roe, who later became his wife, to purchase at Treasury sale for $7.50, the Malamute sled dog, "Lucky", then well knowing that Private First Class Douglass, an enlisted man formerly under his command, felt a strong sentimental attachment for the dog arising from highly unusual experiences, and that Douglass had expressed his willingness to pay up to $300 for the dog, and further knowing that Douglass, at another station, was looking to him, the accused, for sympathetic assistance in the matter, and that the accused then arranged and consummated a sale of the dog from Miss Roe to Douglass for $300, himself receiving the payment, which he turned over to Miss Roe, and never disclosing to Douglass, but rather concealing, the circumstances of the sale and the persons concerned, while he pressed for precipitate payment of the exorbitant price with deceitful representations that the dog was about to be lost to some outsider, wholly nonexistent.

The conclusion is strongly impelled that Douglass' expressions of his desire for the dog, made to the accused in the confidence and trust of a soldier in his commanding officer, seeking loyal and sympathetic assistance, were used by the accused merely as the basis for extorting from him a sum of money which only he would pay, and with the knowledge that he would pay it motivating the entire transaction. No other purchaser was ever contemplated.

That the conduct of the accused in promoting the sale to Douglass for such a price, under such circumstances, was wrongful, and that the sale was thoroughly unconscionable, is too plain for discussion to any fair mind enlightened with any decent conception of ethical human relations. Such a brazen display of unbridled greed and unscrupulous exploitation of advantage over another would shock any normal conscience. To say that it is utterly antithetical to the standards of conduct of an officer and a gentleman is needless redundancy.

Par. 3, AR 600-10, 8 July 1944, reflects the long-established standard of the service in admonishing officers to "strive to build up such relations of confidence and sympathy as will insure the free approach of their men to them for counsel and assistance."

Further comment may be made that the testimony of the accused, in his two sworn statements and at the trial, was marked throughout with evasion and dissimulation consistent with like qualities characterizing his negotiation of the sale to Douglass.

6. The accused is 25 years old, married. After graduation from high school, he was employed as a plumber's and steamfitter's helper at Lake Placid, New York, from 1935 to 1941, except during the winters, when he worked at his own business. As a hobby and then commercially, he raised and trained sled dogs. He served in enlisted capacity in the Army from April 1941 to 18 February 1943, when he received temporary appointment as second lieutenant, Army of the United States, through Field Artillery Officer Candidate School, Fort Sill, Oklahoma. He was assigned to duty at the War Dog Reception and Training Center, Camp Rimini, Helena, Montana, 18 February 1943. He was promoted to the grade of first lieutenant 8 October 1943. The record indicates that he served at Camp Rimini for 18 months and then at Fort Robinson, Nebraska, for three months, in dog training activities, then took Basic Officers' Supply Course at Camp Lee, Virginia, and was at the time of trial on duty at Fort George G. Meade, Maryland, though assigned to Quartermaster Replacement Pool, Camp Lee, Virginia, and that at some time he was transferred to Quartermaster Corps.

7. The court was legally constituted and had jurisdiction of the accused and the offense charged. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence of dismissal is mandatory upon conviction of a violation of Article of War 95.

Fletcher R. Andrews, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

[illegible], Judge Advocate.

SPJGQ-CM 277458 1st Ind

Hq ASF, JAGO, Washington, 25, D. C.

TO: The Secretary of War.

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant James J. Patnode (0-1177931), Quartermaster Corps.

2. Upon trial by general court-martial this officer was found guilty of wrongfully negotiating an unconscionable sale of an Army dog for $300 to an enlisted man formerly of his command, after assisting a young woman, who later became the wife of the accused, to buy the dog from the Government for $7.50, well knowing that the soldier had a sentimental attachment for the dog and had expressed his willingness to pay up to $300 for his purchase, all in violation of Article of War 95. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I concur in that opinion.

At a war dog training station at Camp Rimini, Helena, Montana, in the Spring of 1944, the accused had under his command Private First Class Malcolm C. Douglass, a dogsled driver and meteorologist who had been a member of the Byrd Antarctic Expedition of 1939-1941. There was among the Army dogs at the station a Malamute sled dog named "Lucky", which had been born in Little America during the Antarctic Expedition and, being incapacitated as a sled dog by early injuries, had become a pet of the members of the Expedition. Douglass made public addresses at various places, sponsored by the Army, and the dog accompanied him as an exhibit. Before and after being transferred from the station, Douglass made known to the accused his strong sentimental attachment for the dog and his desire to acquire him in the event he should be for sale by the Government, saying that he was willing to pay $300 or $400, and solicited the assistance of the accused in assuring him, Douglass, an opportunity to be represented in the bidding at such sale. About 1 July 1944, the dog, with many others, was sold by the Treasury as surplus property at Camp Rimini. With the advice and counsel of the accused, Miss Audrey Roe bought the dog for $7.50. The accused then entered negotiations by telegraph with Douglass, then stationed at Fort Ord, California, wherein he represented that the dog had become available for sale, procured authorization by Douglass to buy him at a price up to $300, and

pressed Douglass for immediate payment of $300 to avoid loss of the opportunity to acquire the dog by reason of impending disposition elsewhere. In these communications, the accused concealed from Douglass the circumstances of the sale and the persons involved, leaving Douglass to suppose that the accused was acting on Douglass' behalf. Douglass remitted $300 to the accused, which the accused paid over to Miss Roe. The accused married Miss Roe in October 1944.

I recommend that the sentence be confirmed and carried into execution.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

Myron C. Cramer.

MYRON C. CRAMER
Major General
The Judge Advocate General

2 Incl
Record of Trial
Form of Action

(Sentence confirmed. GCMO 250, 19 June 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGH-CM 277487

14 APR 1945

UNITED STATES v. Captain AUGUSTINE F. LAMBE, JR. (0-314468), Signal Corps.	ALASKAN DIVISION AIR TRANSPORT COMMAND Trial by G.C.M., convened at Army Air Base, Great Falls, Montana, 12 February 1945. Dismissal, total forfeitures and confinement for one (1) year.

OPINION of the BOARD OF REVIEW
TAPPY, GAMBRELL and TREVETHAN, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 96th Article of War

Specification 1: In that Captain Augustine F Lambe, Junior, Signal Corps, 1455th Army Air Force Base Unit, Alaskan Division, Air Transport Command, did, at Army Air Base, Great Falls, Montana, between 1 February 1944 and 1 January 1945, the exact dates of which are unknown, wrongfully and unlawfully convert to his own use funds collected at the said Army Air Base Base Signal Office for personal telephone calls pursuant to Paragraph 10, Army Regulation 105-30 in the approximate sum of $340.95.

Specification 2: In that Captain Augustine F Lambe, Junior, Signal Corps, 1455th Army Air Force Base Unit, Alaskan Division, Air Transport Command, did, at Army Air Base, Great Falls, Montana, on or about 2 January 1945 wrongfully cause to be officially presented to the Personnel Office of the said Army Air Base a certificate in writing as follows:

"I certify that I have transferred all property, funds, and all other items for which I am accountable and responsible, and have in my possession a receipt for same from the Officer succeeding me.

(I further certify that) I have incurred no other indebtedness or obligations during my assignment at this station.

Transferred per par 2, SO 131, Hq. A L S D
dated 21 Dec 44
2 Jan 44
(Date)

/s/ A. F. Lambe Jr
(Signature)"

which said certificate was false and untrue and known to the said Captain Augustine F Lambe, Junior to be false and untrue in that the said Captain Augustine F Lambe, Junior then had in his possession funds collected for personal telephone calls at said Army Air Base pursuant to Paragraph 10, Army Regulation 105-30 for which he was responsible.

The accused pleaded not guilty to and was found guilty of the Charge and Specifications. No evidence of any previous convictions was introduced. He was sentenced to dismissal, total forfeitures and confinement for three years. The reviewing authority approved only so much of the sentence as provides for dismissal, total forfeitures, and confinement for one year and forwarded the record of trial for action under Article of War 48.

3. During the period 1 January 1944 to 3 January 1945 accused was Base Signal Officer at the 1455th Army Air Forces Base Unit, Great Falls, Montana (R. 6). It was the practice at this base to permit personnel to make personal telephone calls which would be included in the Army's bill. The telephone operators would submit to the Signal Office daily a record of all calls. Mrs. Jeanette Helman, a civilian employee working under accused's direction, would tabulate the personal calls and instruct the person concerned to pay the amount of the charge therefor to the Signal Office (R. 10). Accused was responsible for the collection and proper disposition of these funds (R. 25). Telephone bills would be rendered about the 20th of each month for the monthly period ending on the 10th of each month (R. 10). After the bill had been verified, the charges for personal calls were itemized, the money collected for these calls was deposited with the Base Finance Officer, and the bill was certified for payment by accused (R. 10-11).

This money was kept by Mrs. Helman on her desk during working hours, checked and put in the safe at night, and rechecked by her when

she removed it in the morning. Accused and the Assistant Signal Officer were the only persons in the Signal Office who had the combination to the safe (R. 17). Sometime in July 1944 accused began to use this money for his own purposes. Whenever Mrs. Helman found a shortage she called it to accused's attention and he admitted taking the money and agreed to repay it (R. 11). Accused made no effort to conceal his activity in this regard. He referred to it openly as "hitting up Helman's till" and occasionally told her in advance of his intentions (R. 24). Accused's withdrawals made it necessary to use all the money in the fund to cover the amount due on the telephone bill, even though some of it had been collected for calls made subsequently to the 10th of the month and was thus not allocable to the bill it was used to pay. If there still was not enough money after this was done, accused would make up the shortage (R. 12).

On 21 December 1944 orders were issued transferring accused from the 1455th Base Unit (R. 6). Pursuant to orders from higher headquarters accused filed a "clearance sheet" with the Personnel Office on 2 January 1945 (R. 27-29). Among other things this "clearance sheet" contained a certification over accused's signature to the effect that,

> "* * * I have transferred all property, funds, and all other items for which I am accountable and responsible, and have in my possession a receipt for same from the Officer succeeding me.
>
> "(I further certify that) I have incurred no other indebtedness or obligations during my assignment at this station." (R. 29; Pros. Ex. 6).

On 1 January 1945 accused had a conversation with the Transportation Officer at the base and the following day this officer reserved Pullman accommodations to Albany, New York, for accused on a train leaving Havre, Montana, on 4 January at 11:20 p.m. which accused could meet by taking the 7:40 p.m. train from Great Falls (R. 7, 8).

When Mrs. Helman learned of accused's transfer she spoke to him several times about the shortage. On 3 January she asked accused if he was leaving that night and accused replied that he was not and that he could not leave until he had repaid the money he had taken (R. 13, 15). He also gave the Assistant Signal Officer the "impression" that he was not leaving on 3 January (R. 23). It was stipulated by and between the prosecution, the defense, and the accused that accused left Great Falls, Montana, for Havre, Montana, on 3 January 1945 on the 7:40 p.m. train (R. 8). When it was discovered on 4 January that accused had departed the Assistant Signal Officer notified Base Headquarters and, as a result of this report, an audit was made of the account (R. 25). This revealed that there was a shortage of $340.95 (R. 14, 17, 26; Pros. Exs. 1, 2). On the afternoon of the same day (4 January) about 12:30 p.m.

accused telephoned Mrs. Helman from Havre, Montana, and told her that he was sending a check which she would have to hold "a day or two" until he telegraphed her to cash it. She informed him that the shortage had been discovered and connected him with Major Herman Marshall, Director of Supplies and Services at the base (R. 15). Major Marshall told accused to return to the base as quickly as possible (R. 21). On 6 January 1945 Mrs. Helman received a letter from accused postmarked 6 p.m. on 4 January and mailed from Havre, Montana. Inclosed in the letter was accused's personal check dated 9 January 1944 (sic) in the sum of $365 payable to the Treasurer of the United States. The letter called attention to the fact that the check was dated "the 9th" but instructed Mrs. Helman not to cash it until accused had telegraphed her (R. 15; Pros. Exs. 3, 4, 5). This check was never deposited but the shortage was repaid to the Base Signal Office on 6 January (R. 16, 18).

4. After being advised of his rights accused elected to be sworn and testify. He stated that he was graduated from Virginia Military Institute as an electrical engineer and that he practiced his profession until he entered the Army in February 1942. He was assigned to Fort Monmouth, New Jersey, for Signal Corps training. From there he went to Harvard University for four months and then to the Massachusetts Institute of Technology for three months where he was given advanced technical training. He then attended school at Camp Murphy, Florida, and at the completion of his course he was assigned to Great Falls as a Signal Officer (R. 34-36). He admitted taking money from the fund "not with any intention to defraud or keep it but more or less as a damned fool." Inasmuch as his orders granted him a delay en route he could have left the base any time after 1 January but his decision to depart on 3 January was made suddenly about 6 p.m. that night and with full knowledge that he had not settled his accounts. However, he intended to communicate with the Signal Office from Havre the next day with respect thereto. Arrangements had been made with his family to provide him with the money necessary to make restitution but due to a misunderstanding they were holding it for him until he arrived home. For this reason he postdated the check which he mailed to Mrs. Helman (R. 35-38).

On cross-examination accused admitted that the fund was $340.95 short when he left the base and the shortage was the result of his withdrawals of various sums over a period of months for his personal use. He always intended to repay it, never denied responsibility for it, and whenever Mrs. Helman lacked enough money to pay the telephone bill he would give it to her. One reason for his not leaving the base earlier when he was notified of his transfer was the fact that he was trying to get funds to cover the shortage. When he telephoned Mrs. Helman from Havre on 4 January he was not aware that the shortage had been discovered and his only purpose in calling was to notify her that he was sending a check. Accused had signed and delivered "the clearance sheet" to the

Personnel Office on 2 or 3 January 1945 and was aware that in certifying to his freedom from indebtedness he was not making a true statement. However, at the time, he intended to replace the money before he left the base (R. 38, 39).

Captain John A. Hayes, Signal Corps, Signal Officer at Gore Field, testified that he had known accused for two years and during that period he frequently came into contact with accused in connection with their work. In his opinion accused was "as good a signal officer as there is in the Air Forces" (R. 30, 31).

Captain Robert E. Latham, the officer in charge of AACS facilities at the base testified that in the performance of his duty he dealt with accused daily for a period of six months. Accused was, in his opinion, superior to any other signal officer with whom he had dealt (R. 32).

Thomas P. Newcomb, local manager for the Mountain States Telephone Company in Great Falls, testified that from May 1942 to June 1944 his duties brought him into contact with the Signal Officers at a great many bases and that accused was superior to all of them (R. 33, 34).

Captain James H. Teeter, Military Personnel Officer at the base, testified that accused's W.D.,A.G.O. Form No. 66-2 showed that Colonel Meredith had given accused a rating of superior from the period 6 October 1944 to 31 December 1944 (R. 7).

Major Herman Marshall, Director of Supply and Services at the base, testified that he had frequent dealings with accused in the course of his duties and that accused was "far superior to any Signal Officer I ever met of any rank" and that his services were "tremendously valuable to the government." (R. 22).

5. a. Specification 1 of the Charge:

This Specification alleges that accused over a period extending from 1 February 1944 to 1 January 1945 wrongfully converted to his own use the sum of $340.95 which had been collected pursuant to paragraph 10, AR 105-30, 27 February 1943, to pay for personal telephone calls made with facilities for the use of which the Army was charged. This regulation provides that the commanding officer of a post, camp, or station will collect the cost of such calls, plus the tax, and transmit the funds so collected "promptly, as and when received" to the disbursing officer who is to account for them as special deposits. In the event payment is made other than in cash the instrument of payment

must be drawn in favor of the Treasurer of the United States. In no circumstances are these funds to be deposited in the post signal fund. Enough of this regulation has been summarized to show that it contemplates that the fund will be segregated while it is in the hands of the commanding officer. Although accused as Base Signal Officer acted as collecting agent in lieu of the commanding officer, and although the fund collected was, as a matter of administrative convenience, retained at the Signal Office until the time came for payment of the telephone bill, the obligation to segregate and earmark it persisted. The evidence establishes that this was done. It similarly establishes, and accused admits, that commencing in July 1944 he used this fund for his own purposes so that when he was transferred in January 1945 there was a shortage in the fund due to his withdrawals in the amount of $340.95. Regardless of accused's intention to repay the sums he took, the diversion of them by him for his own purposes constituted a wrongful conversion in violation of Article of War 96. The record, therefore, amply sustains the finding of guilty of this Specification.

b. Specification 2 of the Charge:

This Specification alleges that accused on 2 January 1945 in an official capacity falsely certified that he had transferred all funds for which he was responsible to the officer who succeeded him. The evidence establishes, and accused admits, that he signed the certificate set out in this Specification pursuant to standing orders in effect at his base. It is similarly undisputed that at the time he filed this certificate, 2 January 1945, accused knew that he had failed to transfer to his successor some $340.95 of the funds he had collected for personal telephone calls. The record amply supports the finding of guilty of this Specification.

6. After the court had voted on the findings and opened to hear evidence of previous convictions the law member asked the trial judge advocate and defense counsel if the fact that previous punishment had been imposed on accused under Article of War 104 should be read to the court. The trial judge advocate stated that it should not be considered and the defense counsel stated that it should not even have been mentioned. After sentence was imposed a poll of the court revealed that only the law member and the president knew that accused had been punished under Article of War 104 prior to the law member's mentioning it. While it has been held that the receipt in evidence of the records of company punishment under Article of War 104 is prejudicial to the interests of accused (2 Bull. JAG 183), the Board of Review is of the opinion that the mere reference to the fact that punishment was imposed, without more, while improper is not prejudicial error under Article of War 37.

7. The entire court of nine members who sat during accused's trial signed a joint recommendation of clemency to the effect that accused

be retained as an officer. In addition seven of these members wrote individual recommendations to the same tenor.

8. War Department records show that accused is 33 years of age and unmarried. He was graduated from Virginia Military Institute in 1934 and worked as an engineer up to the time he entered on active duty with the Army. He was appointed a second lieutenant, Infantry, Officers Reserve Corps, on 31 May 1934, and reappointed in the same grade on 31 May 1939. He was ordered to active duty on 14 February 1942, promoted to first lieutenant on 24 February 1943, and to captain 21 January 1944. On 19 June 1944 he was reprimanded, restricted to his barracks for one week, and directed to forfeit $115 of his monthly pay under Article of War 104 for cashing nine checks during the first three months of 1944 and two checks in May without having sufficient funds on deposit.

9. The court was legally constituted and had jurisdiction of the accused and the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence, as approved by the reviewing authority, and to warrant confirmation of the sentence. The sentence imposed is authorized upon conviction of a violation of Article of War 96.

Thomas N. Tappy, Judge Advocate

William H. Gambrell, Judge Advocate

Robert E. Trevethan, Judge Advocate

SPJGH-CM 277487 1st Ind

JUN 11 1945

Hq ASF, JAGO, Washington 25, D. C.

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Augustine F. Lambe, Jr. (0-314468), Signal Corps.

2. Upon trial by general court-martial this officer was found guilty of wrongfully converting to his own use the sum of $340.95 from funds which he was required to collect to reimburse the Army for personal telephone calls made by personnel at his base (Specification 1 of the Charge) and guilty of knowingly and falsely certifying that he had transferred all funds for which he was accountable and responsible to the officer succeeding him (Specification 2 of the Charge), all in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for three years. The reviewing authority approved only so much of the sentence as provides for dismissal, total forfeitures and confinement for one year and forwarded the record of trial for action under Article of War 48.

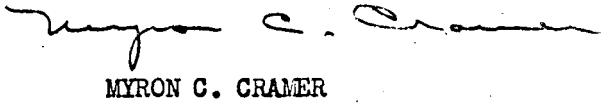
3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, as approved by the reviewing authority, and to warrant confirmation of the sentence. I concur in that opinion. Accused as Base Signal Officer at the 1455th Army Air Forces Base Unit, Great Falls, Montana, was assigned the duty of collecting the charges for personal telephone calls made by personnel at the base with facilities for which the Army was billed. The fund so collected was kept at the Signal Office until the monthly telephone bill was received and verified, and then sufficient money to pay it would be deposited with the Disbursing Officer. Due to the time lag between the end of the monthly billing period and the receipt and verification of the bill there was usually an excess in the fund over what was necessary to pay the current bill, caused by collections having been made which were allocable to the next monthly billing period. In July 1944 accused began to use this money for his own purposes. He made no attempt to conceal his activities in this respect, and both the civilian employee who actually handled the collections and the Assistant Signal Officer were fully aware of them. If at any time there was not sufficient money to pay the monthly bill accused would make up the shortage. On 21 December 1944 orders were issued transferring accused from the 1455th Base Unit. In connection with his change of station and pursuant to orders, accused on 2 January 1945 submitted, over his own signature, a "clearance sheet" certifying

that he had transferred all funds for which he was accountable or responsible to the officer succeeding him. Prior to this date accused had discussed the shortage existing in this fund with the civilian employee who had custody of this fund and assured her he would make restitution. Although he was scheduled to leave on 4 January he left suddenly on the 3d. When it was discovered at the Signal Office on 4 January that accused had departed without making restitution the matter was reported to Headquarters. Shortly after this report was made, and before he knew that the existence of the shortage had been reported, accused on 4 January telephoned the Signal Office and stated that he was sending a check for the full amount of his shortage. He further told them that the check would be postdated because he had to wait until he arrived home to procure funds to cover it. He was ordered, however, to return to the base immediately. Such a check was received from accused in an envelope postmarked 4 January but it was never deposited. Instead, accused made up the deficit by a cash payment on 6 January. The entire court of nine members who sat during accused's trial signed a joint recommendation of clemency to the effect that accused be retained as an officer stating that they did not believe accused was dishonest but merely careless. Seven of these members also wrote individual recommendations urging accused's retention in the service. In addition Captain John P. McQuillen, the Trial Judge Advocate who prosecuted accused, appeared before the Board of Review and made recommendations to the same effect.

For the foregoing reasons I recommend that the sentence as approved by the reviewing authority be confirmed but that the execution of the dismissal be suspended during good behavior, the confinement be remitted and the total forfeitures be reduced to forfeiture of pay of $50 per month for six months and that the sentence as thus modified be carried into execution.

4. Consideration has been given to a letter, with inclosures, from the Honorable James E. Murray, United States Senate, dated 28 March 1945.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



3 Incls
1. Record of trial
2. Ltr fr Sen Murray, 28 Mar 45, w/incls
3. Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence as approved by the reviewing authority confirmed, but execution modified on recommendation of The Judge Advocate General. GCMO 243,19 June 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGK - CM 277518

29 MAR 1945

UNITED STATES v. Private CLYDE C. ANDERSON (6388313), 360th Army Air Forces Base Unit, Squadron S, Brownwood Army Air Field, Brownwood, Texas.	THIRD AIR FORCE Trial by G.C.M., convened at Barksdale Field, Louisiana, 9 March 1945. Dishonorable discharge and confinement for three (3) years and six (6) months. Penitentiary.

HOLDING by the BOARD OF REVIEW
LYON, HEPBURN and MOYSE, Judge Advocates.

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1. The Board of Review has examined the record of trial in the case of the soldier named above.

2. The evidence is legally sufficient to support the findings of guilty of the charges and specifications. The question requiring consideration is the propriety of designating a penitentiary as the place of confinement.

3. The only offense of which accused was found guilty which is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by a statute of the United States of general application within the continental limits of the United States or by the law of the District of Columbia is the offense of obtaining under false pretenses the sum of $50, as alleged in Specification 5 of Charge I. The maximum punishment by confinement authorized by paragraph 104c of the Manual for Courts-Martial for this offense is confinement at hard labor for one year. Assuming, but not deciding, that Specification 5 of Charge I properly charges the offense of obtaining money under false pretenses, an offense recognized as one of a civil nature and so punishable by penitentiary confinement for more than one year by the law of the District of Columbia (ch. 13, Title 22, Code of the D.ofC.), a penitentiary may not be designated as the place of confinement under a sentence adjudged by a court-martial "unless also the period of confinement authorized and adjudged by such court-martial is more than one year" (AW 42).

Inasmuch as the authority for penitentiary confinement is basically conditioned by Article of War 42 upon conviction of some particular offense recognized by Federal civil statute, it is clear that the further condition pertaining to the period of confinement authorized and adjudged by a court-martial likewise relates to the confinement authorized and adjudged for that particular offense. The entire context of the Article supports this view. Confinement in excess of one year not being authorized by the Manual for

Courts-Martial for the offense here in question, it follows that penitentiary confinement in the case is not authorized (CM 226579, Evans, B.R. 15, p. 125, CM 266484).

4. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentence to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years and six months in a place other than a penitentiary, Federal reformatory, or other correctional institution.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGK - CM 277518

1st Ind.
31 MAR 1945

Hq ASF, JAGO, Washington 25, D.C.

TO: CG, 3rd Air Force, Tampa, Florida.

1. In the case of Private Clyde C. Anderson (6388313), 360th Army Air Forces Base Unit, Squadron S, Brownwood Army Air Field, Brownwood, Texas, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years and six months in a place other than a penitentiary, Federal reformatory, or other correctional institution, which holding is hereby approved. Upon the designation of a place of confinement other than a penitentiary, Federal reformatory, or other correctional institution, you will have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM 277518).

Myron C. Cramer

1 Incl
Record of trial

MYRON C. CRAMER
Major General
The Judge Advocate General

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGQ
CM 277564

UNITED STATES	)	XX CORPS
	)	
v.	)	Trial by G.C.M., convened at Headquarters XX Corps, A.P.O. 340, Thionville, France, 25 January 1945. To be shot to death with musketry.
	)	
Technician Fourth Grade WARREN E. SMITH (32187738), 84th Chemical Smoke Generator Company, A.P.O. 230, New York, New York.	)	

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OPINION of the BOARD OF REVIEW
ANDREWS, FREDERICK and BIERER, Judge Advocates

- - - - - - - - - - -

1. The Board of Review has examined the record of trial in the case of the soldier named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 64th Article of War.

Specification: In that T/4 Warren E. Smith, 84th Chemical Smoke Generator Company, having received a lawful command from 2nd Lt John R. Beckett, 84th Chemical Smoke Generator Company, his superior officer, to "get up out of bed and go with us on the line", or words to that effect, did, at Wallerfangen, Germany, on or about 21 December 1944, willfully disobey the same.

He pleaded not guilty to and was found guilty of the Specification and Charge. No evidence of previous convictions was introduced. He was sentenced "to be shot to death with musketry". All members of the court present concurred in the findings and sentence. The reviewing authority approved the sentence and forwarded the record of trial "for action under Articles of War 48 and 50½". The Commanding General, European Theater of Operations, forwarded the record of trial "for action by the President under Article of War 48", commenting as follows:

"Obedience to authority is a vital principle in military life. As has been observed by the Supreme Court of the United States, the army is not a deliberative body, its law is that of obedience. No question can be left open as to the right to command or the duty to obey. When disobedience is indisputably wilful, deliberate, without extenuating circumstances, and, as here, a refusal to perform a military duty requisite to a combat mission and security of forces engaged against the enemy, the death penalty is appropriate. Accused's wilful disobedience of the lawful command of his superior officer was a deliberate, calculated act, not a hasty and spontaneous, unreasoned reaction to the strain of battle. In the light of these circumstances, I am constrained by my responsibility to millions of loyal men who serve with unselfish devotion the needs of their country to recommend that the death sentence be confirmed and executed, as just and exemplary punishment."

3. Briefly summarized, the evidence for the prosecution is as follows:

Accused was a member of the operations platoon, 84th Chemical Smoke Generator Company, which platoon was commanded by Second Lieutenant John R. Beckett (R. 6, 8, 10, 11, 13). On or about 21 December 1944 the organization was "located" at Wallerfangen, Germany, on the west bank of the Saar River, and was engaged in putting up a smoke screen in order to aid the infantry in crossing the river (R. 6-10, 14). The Germans were on the east side of the river, apparently about 300 yards from its bank (R. 11, 12, 14). The accused's organization was under enemy artillery and mortar fire and evidently some small arms fire, and, in the words of one witness, things were "pretty hot" (R. 9, 10, 12-14). The Germans shelled the unit during all of 20 December and ran it out of its positions three or four times. The smoke generators were described as being "out in the open there" (R. 9).

Originally, accused had been in the communications section of the unit, but in September 1944, the operations sections being short of men, the communications section was "broken up" and its personnel transferred to operations (R. 11, 15). Sergeant M. C. Person was accused's section leader (R. 6, 8). The operations platoon had twelve smoke generators, some of which were not in working order at the time. It takes two men to operate a generator and there were twelve generator operators in Sergeant Person's section (R. 11, 12, 15). Since some of the generators were not running, generator operators were used for repair and supply work (R. 12, 15).

"For the time being", accused was engaged in operating a generator, and Lieutenant Beckett considered him a "skilled" operator (R. 12, 15). Accused had not been used on the supply detail. Lieutenant Beckett delegated to his section leader the matter of rotating the men for that service (R. 15).

At night the company stayed in town (R. 6). About 6:30 a.m., 21 December, Lieutenant Beckett told Sergeant Person to get his men up and get ready to go out "on the line" for "smoking" (R. 11, 14). Explaining the meaning of the expression "going out on the line", a witness stated: "Well, we just go out and do our smoking, sir. We were smoking the Saar river there" (R. 9). When Sergeant Person gave the aforementioned order to accused, the latter said that he was not going to get up that morning and that he wanted to stay in that day (R. 8, 9, 11). Person asked accused what was wrong, to which accused replied that he "just wasn't going to get up that morning". Accused gave no reason, and in reply to Person's query whether he was sick, answered "no" (R. 11).

Thereupon the assistant operations sergeant, Samuel B. Hendrix, was summoned, told accused to go out, and asked him what was wrong (R. 6, 8, 11). Accused replied that he was not sick but that he thought he should have the day off and intended to stay in bed (R. 6-8).

Sergeant Person then summoned Lieutenant Beckett, who, upon arrival, asked accused what was wrong. Accused said that some of the men had avoided going out on the line by claiming sickness and that he was not claiming sickness but "just wasn't going out that day" (R. 7, 9, 11, 14). Lieutenant Beckett told him to "get out and get ready to go on the line", to which accused replied, "Sir, I don't want to go out today" (R. 7, 9, 11). Thereupon Lieutenant Beckett said, "Smith, this is a direct order", and he told accused to get up, put on his clothes, and get ready to go out on the line (R. 9, 11, 14). Lieutenant Beckett then asked, "Are you going?", to which accused responded, "No, not now" (R. 11). Accused also said, "I'll get up later, but I'm not going out today; I'm going to take the day off" (R. 14). Lieutenant Beckett immediately placed accused under arrest (R. 16). Accused did not get up and go out on the line during the day (R. 7, 15, 16).

4. The accused made an unsworn statement, in substance as follows:

About 17 December 1944 the communications section was broken up, since it was not needed at the time for laying wire or operating radios. Most of its members were assigned to the operations section. The unit commander explained that the reorganization was necessary because of the shortage of men. Accused accepted the reorganization

in good spirit until he saw the fallacy of the commanding officer's statement. There could hardly have been a shortage of generator operators when there were never more than four generators in operation at any one time.

There were two men in the company classified as smoke generator operators but assigned to other duties. Furthermore, there were two other men assigned to jobs not authorized by the table of organization (R. 16).

Accused's army specialist classifications are clerk-typist, clerk-general, radio operator, and radio repairman. By reason of his classifications, accused felt that he had been unfairly chosen for smoke generator operator duty when "these other men" were available. While performing the duty of a general clerk shortly after the activation of the company, accused learned to type, and later he acted as an assistant to the operations and training officer. At one time he served as a radio operator. He has instructed members of the organization in reading and writing and various other matters connected with the duties of the unit.

Even since the breaking up of the communications section, some men have continued to operate basic communications. Those men had received training and instruction from accused.

At times when there was a temporary shortage of generator operators, accused operated a generator in addition to his duties as a radio operator, and often worked eighteen hours a day.

Although accused did not criticize Lieutenant Beckett "for doing what he did", accused considered it "an act of pettiness".

Accused's statement ends as follows:

> "I think the court can understand my feeling: when you look around you and see the men that you've taught doing their jobs that I in some measure taught them to do, and you are relegated to the job of generator operator, it's — well, you can see how I would feel about this. When you look around you and see the men who, because of you have been able to hold their stripes and do their jobs, or of being able to read and write and then you are yourself found to be of no more service to the unit than a generator operator, which is just a basic unspecialized job — there was no way of saying to the CO, although I told him once, my feelings in the matter. He told me that what I had done was simply beyond the call of duty — it seems to me that after doing all this work for the organization that they simply say, in return: "...get out...". (R. 17).

5. The guilt of accused was proved not only beyond a reasonable doubt but beyond any doubt at all. Having received a lawful order from Lieutenant Beckett, his superior officer, to "get up out of bed and go with us on the line", or words to that effect, accused willfully disobeyed it at the time and place alleged. The order demanded immediate compliance, and when that compliance was refused, Lieutenant Beckett was clearly within his rights in placing accused under arrest. He owed no duty to await a possible change of heart by accused nor to engage in further entreaty. Although accused may have professed an intention to get up later (which would not have been a compliance with the order), he made it clear that he was not going out on the line and that he intended to take the day off.

Accused's claimed dissatisfaction with the treatment accorded him, as expressed in his unsworn statement, is entirely beside the point so far as his guilt is concerned. It was not for him to determine in what capacity he might serve most effectively. A more flagrant case of willful disobedience is difficult to conceive.

6. Attached to the record of trial is a communication from Captain Maceo H. Turner, stating that accused's efficiency and character were excellent during a period of several months before he went overseas, and that accused, an only child, at times shows a strain of stubbornness which "should not be considered altogether as insubordination". Captain Turner suggests that intelligent leadership might have prevented "such an event".

7. The Charge Sheet shows that the accused is 24 years of age and was inducted on 12 November 1941.

8. The court was legally constituted and had jurisdiction. No errors injuriously affecting the substantial rights of the accused were committed. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. The death penalty is authorized by Article of War 64 for the offense of which accused was found guilty.

Fletcher R. Andrews, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

[illegible], Judge Advocate.

SPJGQ-CM 277564 1st Ind

Hq ASF, JAGO, Washington 25, D. C. JUN 26 1945

TO: The Secretary of War

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Technician Fourth Grade Warren E. Smith (32187738), 84th Chemical Smoke Generator Company, A.P.O. 230, New York, New York.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. On 9 May 1945, the Commanding General, European Theater of Operations, who previously had recommended that the death sentence be carried into execution, modified his previous action and recommended that the sentence be commuted to life imprisonment. However, considering all the circumstances of this case, I consider life imprisonment to be too severe a punishment. Consequently I recommend that the sentence be confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor twenty years, and that the sentence as thus modified be carried into execution. I recommend further that the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, be designated as the place of confinement.

3. Consideration has been given to a letter from the accused to the Commanding General, European Theater of Operations, dated 7 March 1945, which letter has been forwarded to this office and accompanies the record of trial.

4. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry the above recommendation into effect, should such action meet with approval.

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

4 Incls
1 Rec of Trial
2. Form of Action
3. Drft of ltr for sig S/W
4. Ltr fr accused dated 7 Mar 1945

(Sentence confirmed but commuted to dishonorable discharge, total forfeitures and confinement for twenty years. GCMO 405, 21 Aug 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGK - CM 277595

13 APR 1945

UNITED STATES v. Second Lieutenant HENRY A. RACKIN (O-582281), Air Corps.	THIRD AIR FORCE Trial by G.C.M., convened at Lake Charles Army Air Field, Lake Charles, Louisiana, 20 and 21 February 1945. Dismissal.

OPINION of the BOARD OF REVIEW
LYON, HEPBURN and MOYSE, Judge Advocates

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 93rd Article of War.
(Finding of guilty disapproved by reviewing authority.)

Specifications 1 to 4 inclusive: (Findings of not guilty)

CHARGE II: Violation of the 95th Article of War.

Specification 1: In that Second Lieutenant Henry A. Rackin, Squadron U, 332d Army Air Forces Base Unit, Combat Crew Training Station, then assigned Squadron N, Lake Charles Replacement Training Unit (Medium Bombardment), Lake Charles Army Air Field, Lake Charles, Louisiana, did, at Lake Charles Army Air Field, Lake Charles, Louisiana, on or about 11 September 1944, with intent to deceive the Commanding General, Eighth Service Command, Dallas, Texas, officially report in writing to the said Commanding General, that the personal effects of Second Lieutenant Charles J. Conn, deceased, and Second Lieutenant Raymond L. Roelle, deceased, and Corporal Bennie D. Hudson, deceased, had been shipped to Charles C. Conn, New London, Missouri, and Mrs. Edith Roelle,

3471 West 155th Street, Cleveland, Ohio, and to Mrs. Florabell Hudson, 800 North Wolf Street, Muncie, Indiana, respectively, which reports were known by the said Second Lieutenant Henry A. Rackin to be untrue, in that the sum of one hundred and eighty dollars ($180.00), lawful monies of the United States, property of the estates of said decedents, had not been shipped to said representatives of said estates, respectively, the exact interest of each estate in the said sum being unknown.

Specification 2: In that Second Lieutenant Henry A. Rackin, Squadron U, 332d Army Air Forces Base Unit, Combat Crew Training Station, then assigned Squadron N, Lake Charles Replacement Unit (Medium Bombardment), Lake Charles Army Air Field, Lake Charles, Louisiana, did, at Lake Charles Army Air Field, Lake Charles, Louisiana, on or about 11 September 1944, with intent to deceive the Commanding General, Eighth Service Command, Dallas, Texas, officially report in writing to the said Commanding General that the personal effects of Second Lieutenant Spero Abraham, deceased, had been shipped to Mrs. Helen I. Abraham, mother of the deceased, to 1215 Grove Street, Vicksburg, Mississippi, which report was known by the said Second Lieutenant Henry A. Rackin to be untrue, in that he had not shipped the sum of one hundred and twenty-five dollars ($125.00), property of the estate of said decedent, to Mrs. Helen I. Abraham.

Specifications 3 and 4 are identical with Specification 2 except as to the name of the deceased, the deceased's relative, and the amount of money that the accused had failed to ship, which differences were:

Specification	Deceased	Relative	Amount
3	2nd Lt. Noah A. Lunsford	James P. Lunsford	$46.35
4	2nd Lt. Billie E. Isgrigg	Mrs. Bernice L. Isgrigg	$117.00

He pleaded not guilty to the Charges and the Specifications. He was found not guilty of all of the specifications of Charge I; not guilty of Charge I (in violation of A.W. 93), but guilty of a violation of the 96th Article of War, and guilty of Charge II and its Specifications. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a period of three months. The reviewing authority disapproved the finding of guilty of Charge I, as modified by the court, approved only so much of the sentence as provided for dismissal from the service, and forwarded the record of trial for action under Article of War 48.

3. Evidence.

a. For the prosecution.

On 3 August 1944, accused, a second lieutenant, Air Corps, stationed at Lake Charles Army Air Field, Louisiana, was appointed Summary Court Officer by Special Order 95 of that Field for the purpose of securing and disposing of the effects of Lieutenants Noah A. Lunsford, Billie E. Isgrigg, and Spero Abraham, all of whom were killed in an aircraft accident on that date (R. 7, Exs. P-1 and 2). On 4 August 1944 accused was similarly appointed Summary Court Officer by S.O. 96 for the same purpose as to the effects of Lieutenants Charles J. Conn and Raymond L. Roelle and Corporal Bonnie D. Hudson, killed in an aircraft accident on that date (R. 7, Exs. P-1 and 3). Among the effects which were removed from the bodies of the deceased and delivered to accused were $125.00 belonging to Lieutenant Abraham, $46.35 belonging to Lieutenant Lunsford, and $117.00 belonging to Lieutenant Isgrigg (R. 8, 9, 10, 11; Exs. P-6, P-7, P-8). A wad of $10.00 bills, which had been partially consumed by fire, was found in the plane in which Lieutenant Conn, Lieutenant Roelle and Corporal Hudson had been killed. These bills were also delivered to accused (R. 11, 12, 17; Ex. P-9), who subsequently presented them to the Calcasieu-Marine National Bank of Lake Charles for redemption. An affidavit, signed by accused at the time, approximated the total amount as $100.00 and represented that Lieutenant Conn was the owner thereof (R. 19; Ex. P-10). It was later determined that the burned bills amounted to a total of $180.00 and on 1 September 1944 a check in that amount was issued to the accused which he cashed on that date (R. 20-22, Ex. P-11).

Boxes containing the effects of the deceased and an inventory thereof were received during the month of September by their respectively designated relatives. The only money (not mentioned in the inventory) contained in such boxes was $14.00 in currency and $5.70 in coins received by Mr. Charles Conn (R. 27; Ex. P-12); 94¢ received by Mrs. Edith Roelle (R. 29; Ex. P-21); $20.00 in currency received by Mr. James P. Lunsford (R. 33; Ex. P-34); $30.00 in currency received by Mrs. Helen I. Abraham (R. 35; Ex. P-43); and $60.73 received by Mrs. Bernice L. Isgrigg (R-37; Ex. P-48).

By letters dated 11 September 1944, accused made his final report as Summary Court Officer in each of the six death cases to the Commanding General, Eighth Service Command, Dallas, Texas. In each report accused stated that the personal effects of the deceased had been shipped to a designated relative and listed as an inclosure a copy of WD AGO Form No. 54, Inventory of Effects, on which no cash was listed in any case (R. 27, 28, 30, 32, 33, 35, 36, 37, 38; Exs. P-13, P-15, P-22, P-24, P-31, P-32, P-35, P-38, P-44, P-45, P-49, P-52).

Inadvertently the accused inclosed in the box sent to Mr. Conn a copy of the affidavit (Ex. P-10) that he had supplied the bank concerning the burned $10 bills showing that they belonged to Lieutenant Conn.

On 1 October 1944, Mr. Conn wrote to accused concerning several articles missing from his son's effects and inquired as to why he had not received the amount of money shown on a copy of the affidavit which had been executed by accused at the bank and which had been placed in his box. In a reply dated 5 October 1944, accused stated that the money mentioned in the affidavit belonged to the enlisted man in the plane and that the only money which Lieutenant Conn had at the time of his death was that contained in his billfold, and requested Mr. Conn to return the affidavit (R. 28, Ex. P-16). Mr. Conn did not comply with accused's request that the affidavit be returned.

As a result of a complaint from Mrs. Isgrigg concerning the manner in which her son's effects had been handled, an official investigation was started on 28 September 1944. The accused was notified of this fact on 5 October 1944 (R. 24, 25). On 6 October, accused sent $60.00 to Mr. Conn and contradicted his previous statements by explaining in the accompanying letter that it was his son's portion of the money found in the plane (R. 28, Ex. P-17). He also wrote additional letters to Mr. Conn on 10, 12 and 16 October in which he attempted to explain the matter further (R. 29, Exs. P-18, 19, 20).

On 7 October 1944 accused sent Mrs. Edith Roelle a money order for $60.00 with a letter stating in substance that this was the amount of money that the hospital "said" she should have received in the box with an explanation "I have a feeling you did not receive all the money that was coming to you, as one of my cases were short considerably" (Ex. P-28). In a subsequent letter to her of 13 October 1944 the accused explained that $180 was found in the plane in which Mrs. Roelle's son was killed, and not knowing which occupant of the plane owned the money it was decided that the fairest thing to do was to divide it equally among the beneficiaries of the three occupants (Ex. P-29).

On the same day (7 Oct 44) accused sent the same amount ($60) to Mrs. Florabell Hudson, the widow of Corporal Bonnie D. Hudson with the same explanation that "I have a feeling you did not receive all the money that was coming to you, as one of my cases were short considerably" (Ex. P-34).

Although accused had previously (25 Sep 44) written to Mrs. Isgrigg, in reply to a complaint by her that the money which she had received ($60.73) did not check with the amount ($104.43) shown on the list inclosed in the box, that the amount shown on such list was a clerical error and that she had received all of the money that her son possessed at the time of his death (R. 38; Ex. P-54), Mrs. Isgrigg received $44.43 from accused 3 October 1944 (R. 37; Ex. P-48). On 4 October 1944 the accused wrote to Mrs. Isgrigg expressing a hope that she had received his money order mailed on 2 October but gave no explanation for sending this money.

On 7 October 1944 accused also sent a money order for $46.50 to Mr. Lunsford with a letter of that date stating that that was the total amount of money that "the hospital said you should have received from me

in the box of belongings delivered to you," and that "I have a feeling you did not receive all the money that was coming to you, as one of my cases were short considerably" (Ex. P-34, P-41). Mr. Lunsford returned to the accused $20 that was found in the box as requested by the accused (Ex. P-43).

On the same date, 7 October 1944, accused also sent to Mrs. Helen I. Abraham $125 by letter containing the same explanation as given to Mrs. Lunsford, Mrs. Hudson and Mrs. Roelle (Ex. P-47).

On 5 December 1944 after he was properly warned the accused made certain verbal admissions to Captain Carl Vischer, who had been appointed to investigate the charges preferred against him. His statement was reduced to writing and was voluntarily signed by the accused (R. 39-40, Ex. P-56). In this statement the accused in substance admitted that he was duly appointed Summary Court Officer to secure and dispose of the effects of the officers and the enlisted man named. He signed the affidavit at the bank regarding the partially-burned $10 bills (Ex. P-10), but he did not know whose money it was. He cashed the check for $180 representing the value of the burned money. He wrote the letters dated 11 September 1944 to the Commanding General in which he stated that the personal belongings of the deceased had been sent to their respective beneficiaries. At that time he still had the $180, but had allocated it equally among the three crash victims by placing the money in separate envelopes and placing the envelopes in the boxes sent to the respective beneficiaries. When he heard that Mr. Conn had not received the $60 put in his box he "surmised" the money would be missing from the boxes of Mrs. Roelle and Mrs. Hudson and, therefore, sent them $60 each. He procured $300 from his "folks" in order to send the money that he did send to the various beneficiaries. He admitted sending all of the letters referred to above as Exhibits and the various sums of money to the beneficiaries. He claimed that he had other duties to perform at the time he was appointed Summary Court Officer and that in trying to do things in a hurry he made "a couple of mistakes" and that his subsequent acts were performed by him in an effort to correct his mistakes. He put all of the money received by him in the respective envelopes. The envelopes were not sealed and when he placed the envelopes in the boxes he did not check their contents.

b. <u>For the defense.</u>

Three officers testified that accused's reputation was good (R. 42-46).

After his rights as a witness had been explained to him, accused elected to testify under oath (R. 47). He received the envelopes containing the effects of the deceased and had a clerk prepare the Form 54 in each case from the data written on each envelope (R. 48). After placing the envelopes in a safe for a few days, he decided to keep them in his desk drawer, which had no lock, because it was more convenient (R. 54). When he received the $180.00 from the bank, he placed $60.00 in each of three

additional envelopes which he also kept in his desk. He paid several bills owed by some of the deceased for laundry and dry cleaning from the money in one of the envelopes, but threw away the receipts (R. 54). Although the envelopes remained in his desk for about three weeks, he never checked the amounts contained therein; but he was aware that there was much currency in them because of the fact that he changed it to new envelopes on two or three occasions. He placed all of the envelopes in the proper boxes without checking them before they were shipped (R. 53). When he learned that an investigation was being conducted as a result of Mrs. Isgrigg's complaint and that Mr. Conn had made inquiry concerning the shortage of money, he sent to each beneficiary the amount of money for which he had given receipts at the hospital because he "presumed" that if two of the boxes were short the others were also short (R. 62) and "I did not want any more investigations" (R. 58). He was aware of the fact that he had made false and contradictory statements in various letters he had written to the beneficiaries. He gave as his reason for some of these statements that he thought they had received the money and he just wanted to clear up the matter. For other contradictory statements he offered no explanation (R. 65, 67, 68). After mailing the money to Mrs. Isgrigg, he asked her to write to Colonel Tate that she was satisfied because he was afraid that he would be court-martialed (R. 66). When questioned as to why he had not included the $180.00 when preparing the Forms 54, he explained that such forms had already been typewritten before he received the money and he did not want to have them retyped because there was a scarcity of forms on his field (R. 71). He explained that approximately $12 was spent out of the $117 belonging to Lieutenant Isgrigg for laundry and cleaning bills, reducing the amount to $104.43, which amount he counted and put in the proper envelope and wrote the new amount on the outside (R. 86).

Accused was commissioned in August 1943, when 23 years of age, after having been a First Sergeant for one year prior to going to OCS (R. 69, 70, 80). He worked for his father just before his entry into the Army in 1941, and his father has always handled all of his financial matters (R. 72). When he decided to send the money to the various persons, he wired his mother and father for $300.00 (R. 88). An entry for 7 October 1944 in the bank account of James Rackin and Helen B. Rackin shows a withdrawal of $300.00 (Defense Ex. A).

Sergeant L. E. Gill testified that he accompanied the accused to the bank with the burned money and he heard accused tell the bank representative that he did not know which one of the three victims of the plane accident owned the money, but as Lieutenant Conn was the pilot and in command of the plane if it was necessary to name only one owner to name him (R. 89-90). When the accused finally received the money from the bank he saw the accused put it in his unlocked desk drawer (R. 91).

4. The evidence for the prosecution clearly established that the accused received among the effects of the deceased officers and the enlisted men whose estates he had been appointed to administer the following sums:

Lt. Abraham	$125.00
Lt. Lunsford	46.35
Lt. Isgrigg	117.00
From the plane occupied by Lts. Conn and Roelle and Corp. Hudson	180.00
Total	$468.35

On a date not shown in the record the accused sent to the beneficiaries of the various estates boxes purporting to contain all of the effects of the deceased. When the boxes were received they contained only the following sums of money:

Abraham	$30.00
Lunsford	20.00
Isgrigg	60.73
Conn	19.70
Roelle	.94
Total	$131.37

There was, therefore, a shortage of $336.98.

On 11 September 1944 the accused officially reported in writing to his Commanding General in connection with each estate that he had gathered, inventoried and shipped to the respective beneficiaries the personal effects of each deceased. In view of the uncontradicted evidence recited above, the official statements made by the accused were false. The record, therefore, clearly establishes that the accused did on the date averred in the Specifications officially report to his Commanding General in various documents that the personal effects of the deceased military personnel named had been shipped to their respective beneficiaries and that such statements were false.

The only question left for discussion is whether the evidence legally supported, and its weight favored the court's findings that the accused knew the statements were false. The intent to deceive may properly be inferred from the fact, if shown, that accused knew the statements to be false. The evidence was clear and convincing that accused knew the statements were false as averred. The accused's contention that he was so young and inexperienced that he did not know enough to count the money when he received it, or count it while he had it, or count it when he placed it in envelopes and placed the envelopes in the various boxes is incredible. The members of the court had the opportunity of seeing the accused and observing his demeanor. They were fully justified in rejecting his protestations of innocence. The conduct of the accused was dishonorable and reprehensible. His failure to turn over to the beneficiaries the money due them and then his hurried restitution when he heard of an impending investigation clearly indicate a guilty conscience and convincingly shows that accused had know-

ingly appropriated the money to his own use. We are of the opinion that the court was justly warranted in finding that accused knew his statement to the Commanding General was false and that, therefore, he intended to deceive. It is well established that an officer who dishonorably makes a false official statement with intent to deceive may be found guilty of violating the 95th Article of War (CM 249824, Graves; CM 275353, Garris).

5. War Department records show the accused to be 23½ years of age and single. He graduated from high school and for 2 years attended college. He was employed for six months as a moving picture actor. He enlisted in the service on 17 January 1941 and served in the capacities of a clerk, chief clerk, and First Sergeant. On 21 August 1943 he was commissioned 2nd Lieutenant, Air Corps, AUS.

6. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of the 95th Article of War.

Judge Advocate

Judge Advocate

Judge Advocate

SPJGK - CM 277595 1st Ind

Hq ASF, JAGO, Washington 25, D. C.

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Henry A. Rackin (O-582281), Air Corps.

2. Upon trial by general court-martial and as finally approved by the reviewing authority accused was found guilty of making false official statements with intent to deceive (four specifications) in violation of Article of War 95. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a period of three months. The reviewing authority approved only so much of the sentence as provided for dismissal from the service and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings and the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. I concur in that opinion.

The accused was appointed summary court officer to administer the effects of five officers and an enlisted man who had been killed in airplane accidents. The cash found among the effects of the deceased totaled $468.35. The accused shipped the effects of the deceased to their respective beneficiaries but failed to include $366.98 of the money. He reported to his Commanding Officer in writing separately as to each deceased that he had sent all of the effects to the beneficiaries. When an investigation was instituted accused immediately obtained money from his parents and distributed to the beneficiaries the amounts to which they were entitled. Dismissal is warranted.

I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

Myron C. Cramer

2 Incls
1. Record of trial
2. Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence as approved by reviewing authority confirmed. GCMO 224, 13 June 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGN-CM 277601

UNITED STATES	)	FOURTH SERVICE COMMAND
	)	
v.	)	Trial by G.C.M., convened at
	)	Miami Beach, Florida, 14 March
Private First Class GERALD	)	1945. Dishonorable discharge
C. JENSEN (36301353), Company	)	(suspended) and confinement for
13, Army Ground and Service	)	one (1) year. Rehabilitation
Forces Redistribution Station.	)	Center.

OPINION of the BOARD OF REVIEW
LIPSCOMB, O'CONNOR and MORGAN, Judge Advocates

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1. The record of trial in the case of the soldier named above, which has been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and sentence, has been examined by the Board of Review, and the Board submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that Private First Class Gerald C. Jensen, Company 13, Army Ground and Service Forces Redistribution Station, Miami Beach, Florida, then a member of Company 16, Army Ground and Service Forces Redistribution Station, Miami Beach, Florida, did, without proper leave, while enroute from Fort Sheridan, Illinois, to Army Ground and Service Forces Redistribution Station, Miami Beach, Florida, absent himself from his organization at Miami Beach, Florida, from about 31 October 1944 to about 18 January 1945.

3. The evidence for the prosecution shows that by paragraph 10, Special Orders 240, Army Service Forces, Headquarters Personnel Center,

Sixth Service Command, Fort Sheridan, Illinois, the accused was ordered to proceed from that station on 2 October 1944 and to report on 26 October 1944 to the Army Ground and Service Forces Redistribution Station, Miami Beach, Florida (R. 7; Pros. Ex. 1). The morning report of the accused's former station shows that he left there on 2 October 1944 (R. 7; Pros. Ex. B). The order assigning the accused to his new station authorized a delay of twenty-two days en route and designated 26 October 1944 as the date on which the accused was to report. This delay en route appears to have been extended by a telegram for five days so as to postpone the date upon which the accused was required to report to his new assignment to 31 October 1944 (R. 9; Pros. Ex. E). Subsequently on 19 January 1945 the Provost Marshal's office at the Redistribution Station at Miami Beach, Florida, was notified that the accused was being held in confinement by the 1679th Service Unit, Camp Skokie Valley, Glenview, Illinois (R. 13-14). This fact was recorded in a morning report of that organization, as follows:

"19 January 1945
Jensen, Gerald C 36301353 Pfc
ASF & AGF Redistribution Sta Albion
Hotel Miami Beach Fla Race W atchd &
jd for conf for 61st AW at 1000" (Pros. Ex. D).

Thereafter the accused was returned under guard to his assigned station on 27 January 1945 (R. 12-13). Prior thereto on 19 January 1945 the following entry was made in the morning report of Company 16, Army Ground and Service Forces Redistribution Station, Miami Beach, Florida:

"19 Jan 45. Jensen, Gerald C. 36301353 PFC
Fr enr to jn to AWOL as of 2400 26 Oct 44" (Pros. Ex. C).

The company commander of Company 16, who was responsible for this entry, admitted that he had not been on duty with Company 16 on 26 October 1944 and that he had no personal knowledge of the facts recorded (R. 10-12). He further testified that it would have been impossible for a man to have reported to the Army Ground and Service Forces Redistribution Station without that fact being entered on "the morning report". On the other hand, he admitted that he did not know what took place before he was appointed to Company 16 (R. 9-10, 12).

4. The Special Order described above proved that the accused had been assigned to the Army Ground and Service Forces Redistribution Station, Miami Beach, Florida, and that he was due to report to this new station on 26 October 1944. The morning report of his former organization proved that the accused left Fort Sheridan, Illinois, as ordered on 2 October 1944. The telegram referred to was apparently accepted by both the prosecution and the defense as having extended the accused's delay en route so that he was not required to report to his new station at Miami Beach, Florida, until 31 October 1944.

The most important item of evidence, the extract copy of the morning report of Company 16, Army Ground and Service Forces Redistribution Station, sought to establish that the accused was on 26 October 1944 en route to join Company 16 and that on that date he was absent without leave from that organization. The important question at once arises as to what probative force should be given to this morning report entry. In discussing the general question as to the probative force of a duly authenticated morning report, The Judge Advocate General has recently stated that:

> "The decisions of this office have interpreted the provisions of paragraph 117 of our Manual as requiring the officer responsible for the morning report to have personal knowledge of the entries made therein. This is the principal safeguard provided by law to assure the veracity and accuracy of such entries. Although such personal knowledge need not be shown as a prerequisite to the introduction of the morning report into evidence, lack of such personal knowledge may be shown by the defense for the purpose of impeaching the entries. In this particular it should be observed that the morning report when properly authenticated is '<u>prima facie</u>' evidence of the truth of the matters contained therein unless such entries are 'obviously not based on personal knowledge'. The lack of such personal knowledge may appear on the face of the indorsement or may be established by extrinsic evidence. It should further be observed that responsibility for the entries in a morning report cannot ordinarily be delegated but that the manual and clerical task of preparing the morning report may be delegated and need not be performed by the officer responsible therefor. It follows that the lack of personal knowledge upon the part of the clerk who may perform the manual task of writing the morning report is of no evidentiary importance. Lack of personal knowledge only of the officer making the morning report is subject to attack" (4 Bull. JAG 86-88, March 1945).

In view of the authority of the above language we must presume that the morning report in question, when originally presented, was made upon the basis of the personal knowledge of the commanding officer responsible therefor. It, therefore, presented proof, <u>prima facie</u>, that the accused had been assigned to Company 16 and that he was absent without authority therefrom on 26 October 1944 (3 BR 344, <u>Anderson</u>). Had no other evidence been introduced, the <u>prima facie</u> case of absence without leave thus established would have been legally sufficient to have sustained the court's finding of guilty. The cross-examination, however, of the company commander of Company 16, who was responsible for the entry in the morning report, revealed that he had no personal knowledge of the assertions made in the morning report in question and that he was not even in charge of Company 16 at the time of the alleged absence of the accused. Necessarily, therefore, this cross-examination established that the entry was hearsay in character

and that the principal safeguard provided by law to assure the veracity and accuracy of a morning report entry was not observed.

The Digest of Opinions of The Judge Advocate General, 1912-40, sec. 395 (18) states that:

> "Where it is manifest that entries in an official report required to be kept, such as a morning report or a muster roll, could not have been based upon the personal knowledge of the person who made such record, such entries are not competent evidence of the facts therein stated."

Since the entry in the morning report was shown to be hearsay in character and not based on the personal knowledge of the officer responsible therefor, the prima facie case for the prosecution which was originally established was rebutted.

The extract copy of the morning report of the 1679th Service Unit, Camp Skokie Valley, which states in effect that the accused was joined to that organization on 19 January 1945 in order to confine him for being absent without leave from his station at Miami Beach, is, insofar as that entry seeks to show the accused as absent without leave, "obviously not based upon personal knowledge" (MCM, 1928, par. 117a). In a recent case, analagous to the present one, the Board of Review made a statement, as follows:

> "The evidence shows that on 12 January 1944 accused was placed on detached service with * * * near Leesville, Louisiana, and started for his station in a truck with another soldier, Private Spotts, who was on the same detached service. When the truck reached a point about six miles from Leesville accused "jumped off" and started down the road in the opposite direction. Spotts did not again see accused until he (Spotts) arrived at Fort Ord. However, the record does not disclose where Spotts spent the intervening period and there is no evidence either direct or circumstantial that accused absented himself without leave and failed to report to his detached service station as directed. The entry on the morning report that accused was in confinement at Fort Jay, New York, on 23 February 1944 would be sufficient evidence of the termination of an existing prior absence without leave but it is not sufficient to supply evidence of the initiation of such absence. In the opinion of the Board of Review the evidence is legally insufficient to sustain the finding of guilty of the Specification under consideration" (CM 262693, Sikes).

The evidence showing that the accused was confined at Camp Skokie Valley, Glenview, Illinois, on 19 January 1945 and that he was returned under guard to the Army Ground and Service Forces Redistribution Station at

Miami Beach, Florida, on 27 January 1945 does not warrant an inference that he was absent without leave on a previous date. Furthermore, there is no evidence in the record showing why the accused was at Camp Skokie Valley, Glenview, Illinois, and we can only speculate as to why he was there and why he was sent from that place under guard.

One other item of evidence deserves consideration. The company commander of Company 16 testified that it would have been impossible for the accused to have reported to the Army Ground and Service Forces Redistribution Station without that fact having been recorded on the morning report. Although this statement may well be true, there is no evidence that the accused had not reported to that organization and no evidence that such a fact had not been reported on some morning report. The company commander was unable to supply any information on this point and had no knowledge of what had taken place prior to his assignment to Company 16. It may be well to reiterate that an accused must not only be guilty but that he must be proved guilty. The conclusion is compelled that there is no competent proof, direct or circumstantial, that the accused did not report to his new station on 31 October 1944 or that he was absent without leave therefrom as alleged.

5. For the reasons stated the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

Abner E. Lipscomb, Judge Advocate.

Robert J. Kenner, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 277601 1st Ind

Hq ASF, JAGO, Washington 25, D. C.

TO: The Secretary of War

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private First Class Gerald C. Jensen (36301353), Company 13, Army Ground and Service Forces Redistribution Station.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, and, for the reasons stated therein, recommend that the findings of guilty and the sentence be vacated, and that all rights, privileges and property of which the accused has been deprived by virtue of the findings and sentence so vacated be restored.

3. Inclosed is a form of action designed to carry into effect these recommendations, should such action meet with your approval.

Myron C. Cramer

2 Incls
Incl 1 - Record of trial
Incl 2 - Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Findings and sentence vacated, GCMO 364, 23 July 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGH-CM 277602

9 APR 1945

UNITED STATES v. Second Lieutenant FRED F. WHITE (0-768346), Air Corps.	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Hobbs Army Air Field, Hobbs, New Mexico, 22 February 1945. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
TAPPY, GAMBRELL and TREVETHAN, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 94th Article of War

Specification 1: In that Second Lieutenant Fred F. White, Squadron H, 3017th AAF Base Unit, did, at Hobbs Army Air Field, Hobbs, New Mexico, on or about 25 December 1944, feloniously take, steal, and carry away one A-2 jacket of the value of about $8.12, property of the United States, furnished and intended for the military service thereof.

Specification 2: In that Second Lieutenant Fred F. White, * * *, did, at Hobbs Army Air Field, Hobbs, New Mexico, on or about 10 January 1945, wrongfully, knowingly, and without proper authority, dispose of an A-2 jacket of the value of about $8.12, property of the United States, furnished and intended for the military service thereof, by mailing said jacket to Mrs. Edna Russell, of Bakersfield, California.

Specification 3: In that Second Lieutenant Fred F. White, * * *, did, at Bakersfield, California, on or about

> 1 August 1944, wrongfully, knowingly, and without proper authority, dispose of an A-2 jacket of the value of about $8.12, property of the United States, furnished and intended for the military service thereof, by giving said jacket to one Virgil Russell.

He pleaded guilty to the Charge and to each of the three Specifications, substituting "10 January 1945" for "25 December 1944" in Specification 1; and he was found guilty of the Charge and each of the three Specifications, substituting "10 January 1945" for "25 December 1944" in Specification 1. No evidence of any previous conviction was introduced. He was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The prosecution introduced no evidence in support of accused's pleas of guilty.

4. Second Lieutenant John E. LaViolette, Student Officer, called as a witness for the defense, testified that he had been well acquainted with accused for eight months, having worked with him, attended school with him and gone about with him socially. Accused's reputation for character is "excellent." He is considered by his associates "to be an officer and a gentleman." He "has always been straight forward and upright and he has never been in any trouble before" (R. 8, 9).

First Lieutenant Geddie L. Simms, Classification Officer, Hobbs Army Air Field, called as a witness for the defense, testified that he is official custodian of accused's 66-2 card and that it contains no record of any previous court-martial trial of accused and no record of any punishment of accused under Article of War 104. Accused received two efficiency ratings of "excellent" during 1944.

Accused, after having his rights as a witness explained to him by the court, elected to testify under oath in his own behalf. Both Specification 1 and Specification 2 refer to the same jacket. Accused saw this jacket hanging in a latrine a few days after the Christmas holidays, 1944. It continued to hang there for about three days. Meantime several officers "had shipped out and they sign a statement of charges for what they lose." Accused believed that this jacket had been covered by a Statement of Charges signed by some officer who had lost or abandoned the jacket. He took the jacket and retained it in his possession "for three or four days to see whether anyone would put a notice on the bulletin board, which was the usual procedure if anything was lost." Accused then mailed the jacket about 10 January 1945 to his sister, Mrs. Edna Russell, at Bakersfield, California. He did not at the time believe it wrong either to take the jacket or to mail it to his sister, although he now realizes

that both acts were wrong. The jacket described in Specification 3 was "purchased" by accused "through a Statement of Charges for the price of $8.00, which is a general practice, and I thought once I paid for it I thought you could do what you wanted. * * * It was a regular practice that you put in a Report of Survey or sign a Statement of Charges, so I did it as many other fellows did and I see now that I am wrong and I am at the mercy of the Court, that is why I plead guilty." Accused admitted that he had this jacket in his possession at the time he signed the Statement of Charges. After signing the Statement of Charges he gave the jacket to Virgil Russell (R. 12-17).

5. The facts, as disclosed by accused's own testimony, make it clear that his pleas of guilty to the Charge and the three Specifications were not improvidently made.

No basis existed for any belief by accused that he had any right to possess or dispose of the jacket described in Specifications 1 and 2. His testimony that, after taking possession of this jacket, he watched the bulletin board for three or four days for a notice of the loss of it plainly reveals his guilty knowledge.

Charging the accused in the same charge sheet with the felonious taking of this jacket (Specification 1) and the wrongful disposition of it (Specification 2) did not constitute an illegal or unreasonable multiplication of charges:

> "Accused were found guilty of both the larceny and the wrongful disposition by sale of the same Government property in violation of A. W. 94. Held: The record is legally sufficient to support the findings and sentence. There is no unreasonable multiplication of charges. The felonious taking of the property and its subsequent wrongful disposition are distinct offenses and properly so charged (MCM, 1928, pars. 27, 150*i*). CM NATO 1135 (1944)" (3 Bull. JAG 13).

Accused's contention that at the time he signed a Statement of Charges with respect to the jacket described in Specification 3 and paid thereon the sum of $8 he believed he was making a lawful "purchase" of the jacket strains credulity. His admission that he had the jacket in his possession at the time he signed the Statement of Charges discloses his knowledge at that time of the falsity of his representation that the jacket had been lost. His claim that he believed this act to be free of wrongdoing cannot be accepted.

The Board of Review is of the opinion, therefore, that the court's findings of guilty of the Charge and the three Specifications are amply supported by the record of trial.

6. The records of the War Department show that accused is 24 years of age and single. He is a high school graduate and, in civilian life, worked for Consolidated Aircraft Corporation from July 1939 until November 1942 as an assembly line employee. He was a member of the Enlisted Reserve Corps from 23 November 1942 until 7 April 1943, at which time he was called to active duty. Upon graduation from Officer Candidate School, at Douglas Army Air Field, Douglas, Arizona, on 8 February 1944, he was commissioned a second lieutenant, Air Corps, Army of the United States.

7. The court was legally constituted and had jurisdiction of the accused and the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. The sentence imposed is authorized upon conviction of a violation of Article of War 94.

Thomas N. Tabby, Judge Advocate

William H. Bamberell, Judge Advocate

Robert C. Trevethan, Judge Advocate

SPJGH-CM 277602 1st Ind

Hq ASF, JAGO, Washington 25, D. C. APR 17

TO: The Secretary of War

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Fred F. White (O-768346), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. In view, however, of the youth of the accused, his apparent good record up until the time of his present difficulty, the nominal value of the property wrongfully taken by him and the absence of aggravating circumstances surrounding the wrongful taking, I recommend that the sentence be confirmed but commuted to a reprimand and forfeiture of $50 per month for three months and that the sentence as thus commuted be carried into execution.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

3 Incls
1. Record of trial
2. Dft ltr for sig S/W
3. Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed, but commuted to a reprimand and forfeitures and as commuted ordered executed. GCMO 204, 9 June 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGK - CM 277677

2 Apr 1945

UNITED STATES v. Second Lieutenant ROBERT B. BRUST (O-795124), Air Corps.	)))))))	ARMY AIR FORCES WESTERN TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at Amarillo Army Air Field, Amarillo, Texas, 12 March 1945. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
LYON, HEPBURN and MOYSE, Judge Advocates.

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1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. Accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Robert B. Brust, attached Squadron V, 3701st Army Air Forces Base Unit, did, at Amarillo Army Air Field, Amarillo, Texas, on or about 12 January 1945, with intent to defraud, wrongfully and unlawfully make and utter to the Amarillo Army Air Field Exchange, Amarillo, Texas, a certain check, in words and figures as follows, to wit:

No. OK SAN ANTONIO, TEXAS, Jan 12 1944
Capt Jones

30-65
NATIONAL BANK OF FORT SAM HOUSTON
At San Antonio

PAY TO THE ORDER OF Cash ---------- $20/00

Only Twenty & ----------no DOLLARS

/s/ R. B. Brust
2nd Lt. A.C. O-795124

(reverse)

Pay to the Order of
AMARILLO NATIONAL BANK
For Deposit Only
AMARILLO ARMY AIR FIELD EXCHANGE

and by means thereof, did fraudulently obtain from the said Amarillo Army Air Field Exchange the sum of twenty dollars ($20.00), lawful money of the United States, he the said Second Lieutenant Robert B. Brust then well knowing that he did not have and not intending that he should have sufficient funds in the said National Bank of Fort Sam Houston, San Antonio, Texas for the payment of said check, said act being of such a nature as to bring discredit upon the military service.

NOTE: Specifications 2 and 3 are identical with Specification 1 except as to amount and date, which differences were as follows:

Specification	Amount of Check	Date
2	$10.00	24 Jan 1945
3	$20.00	27 Jan 1945

Specification 4: In that Second Lieutenant Robert B. Brust, * * *, did, at Amarillo Army Air Field, Amarillo, Texas, on or about 13 December 1944, wrongfully and falsely officially report on an Officers' Confidential Registration Form that his date of birth was May 10, 1917, which report was known by the said Second Lieutenant Robert B. Brust to be untrue in that his date of birth was May 10, 1915.

Specification 5: (Finding of not guilty).

He pleaded guilty to and was found guilty of the Charge and Specifications 1, 2, 3, and 4. He pleaded not guilty to and was found not guilty of Specification 5 of the Charge. Evidence was introduced of a previous conviction by general court-martial of violating the 96th Article of War by violating paragraph 16a(1) of Army Air Forces Regulation No. 60-16 (minimum altitudes of flight) on 20 May 1944, for which offense he was sentenced to forfeit $50 of his pay per month for three months and to be reprimanded. In the instant case he was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. In view of the plea of guilty of the accused to the Charge and to Specifications 1 to 4, inclusive, the prosecution introduced no evidence concerning these specifications (R. 10). As the court found the accused not guilty of Specification 5 of the Charge to which he pleaded not guilty, it is unnecessary to review the evidence introduced by the prosecution in support thereof.

4. The accused having been advised of his right to remain silent, to make an unsworn statement, or to testify under oath on his own behalf, elected to testify (R. 15). He gave his name and rank and stated that he was in the military service. His home was in Evansville, Indiana, where his mother, solely dependent upon the accused, resided. His father died 27 September 1944. He himself is married but there are no children of the marriage. From May 1941 until May 1942 he was "flying with the RAF". On the latter date he enlisted in the armed forces of the United States and thereafter graduated from Glider School and served six months overseas with a Troop Carrier Unit. He was commissioned in November 1942 and, since his return from overseas service, has been in various air fields receiving airplane pilot and gunnery instructions (R. 16-17).

With reference to the specifications to which he pleaded guilty, accused stated that until September 1944 he had alloted $80 of his pay monthly to his mother. Due to his father's death in September he cancelled this allotment and arranged with his mother to send her each month several of his signed checks with the amount thereof left blank. She was to fill in the amount, but the amount was not to exceed $100 each month. She was to use the proceeds for her own benefit. These checks were drawn on the same bank upon which the checks were drawn which were made the basis of Specifications 1 to 3 (R. 17). Under this arrangement accused sent his mother two checks in January and she filled them in "for the amount" (R. 18). In addition he sent her a check for $38 and some cents.

On the date of trial he redeemed the three checks cashed by the Amarillo Army Air Field Exchange, totaling $50.00, by payment of that amount to the Amarillo Army Air Field Exchange. He stated that the first indication that he had that the checks had been returned marked "insufficient funds" was "approximately a week ago" (R. 20).

Upon cross-examination he admitted that on 25 January 1945 he discussed the return of some of his checks with a Lieutenant Schaaf and endeavored to excuse the occurrence by the fact that his mother had been "drawing" checks on the account. Nevertheless on 27 January following he cashed another check at the Field Exchange. In explanation, he stated that he had telephoned his mother, who said she would send some money to the bank (R. 22). While his mother did not draw more than $100 per month during October, November and December, by using approximately two of his checks each month, he "imagined" that she exceeded that amount in January. He received his January bank statement about the 6th of the month (R. 23).

It was stipulated that the Amarillo Army Air Field Exchange received $50 in payment of the three checks covered by Specifications 1, 2, and 3, and that the accused's balance in the National Bank of Fort

Sam Houston, San Antonio, Texas, on 12 January 1945, was $27.67 (R. 24).

With reference to Specification 4 of the Charge, the accused stated that he misrepresented his age because he wanted to get overseas duty and was told that he was too old. At Maxwell Field he was recorded as 27 years of age instead of his real age of 29 and for that reason entered his birth date 10 May 1917 instead of 10 May 1915. (R. 19-21.)

He admitted that he had been court-martialed once before. It was for flying at an altitude below one thousand feet at Evansville, Indiana (R. 20).

(In view of the finding of not guilty of Specification 5 of the Charge, accused's testimony in defense thereof is omitted.)

5. The accused pleaded guilty to the Charge and to all of the specifications of which he was found guilty. The meaning of his plea was fully explained to him and he elected nevertheless to let the plea of guilty stand. The effect of such a plea is to admit all of the elements of the offense alleged in the specifications to which he pleaded guilty.

With reference to Specifications 1, 2 and 3 the accused therefore admits that he did, during January 1945, on three occasions cash his check with the Amarillo AAF Exchange for amounts totaling $50.00, well knowing that he did not have and not intending to have sufficient funds in the drawee bank for the payment of any of the checks. He admits that he thereby intended to defraud and did defraud the Exchange of the sums received in exchange for the checks.

In testifying in his defense he intimated that the lack of funds in his bank account was due to the fact that his mother drew from the account more money than he had anticipated she would draw under his arrangement with her to draw no more than $100 per month. The truthfulness of this intimation was very questionable. Accused made no attempt to show how much his mother had drawn during January. He "imagined" that she had exceeded the $100. The evidence to prove the exact amount drawn by her was readily available to the accused. He had only to produce the checks and his copy of his bank account. His failure to do so when coupled with his statement that he "imagined" that she had exceeded her allowance justified the court in ignoring this testimony as constituting any defense to these specifications. While his testimony contains certain statements which, if true, would cast some doubt on his guilt of the specifications, his reaffirmation of his plea of guilty after a careful explanation of its meaning and consequences justified the court in its apparent conclusion that the plea was not improvidently entered. The findings of guilty should be sustained.

With reference to Specification 4 of the Charge, the accused's plea of guilty alone is legally sufficient to support the finding of guilty.

In his testimony he did not endeavor to defend the charge, but in mitigation claimed that his motive was to obtain an overseas assignment. Although there is no allegation of intent to deceive, the specification sets forth a complete statement of the military offense of wrongfully making a false official statement knowing such statement to be untrue (CM 231445, 18 B.R. 197, II JAG Bull. 192). In addition by his own testimony he admitted that he intended to deceive. His plea of guilty admits all of the elements of the offense as set forth in the specification. Under the circumstances the finding of guilty should be sustained.

6. War Department records show the accused to be 30 years of age (10 May 1945) and divorced. He graduated from high school and for two years attended Indiana University. From February 1935 until May 1941 he was employed as a salesman and sales manager of advertising, receiving an annual salary during the last two years in excess of $3,000. He enlisted in the R.C.A.F. on 13 June 1941 and upon completion of his training in Elementary Flying School was on 21 May 1942 transferred to the U.S. Air Force. On 29 November 1942 he was appointed second lieutenant, AUS, and rated Glider Pilot upon completion of his training at Advanced Flying School, Stuttgart, Arkansas. On 25 June 1944 he was convicted by a general court-martial of a violation of the 96th Article of War by violating the provisions of paragraph 16a(1) Army Air Forces Regulation No. 60-16 by piloting a training airplane at an altitude of less than 1,000 feet above ground near Evansville, Indiana, for which offense he was sentenced to forfeit $50 of his pay per month for three months and to be reprimanded.

7. The court was legally constituted and had jurisdiction of the accused and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon a conviction of a violation of Article of War 96.

(Sick in Quarters), Judge Advocate.

Carle Shepherd, Judge Advocate.

Herman Moyse, Judge Advocate.

SPJGK - CM 277677 1st Ind.

APR 9 1945

Hq ASF, JAGO, Washington 25, D.C.,

TO: The Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Robert B. Brust (O-795124), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed but that the forfeitures be remitted and that the sentence as thus modified be carried into execution.

3. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

3 Incls
1. Record of trial
2. Drft ltr sig S/W
3. Form of Ex action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed, forfeitures remitted. Sentence as modified ordered executed. GCMO 178, 9 June 1945).

WAR DEPARTMENT
Army Service Forces.
In the Office of The Judge Advocate General
Washington, D.C.

SPJGQ - CM 277686

UNITED STATES	)	FOURTH ARMY
	)	
v.	)	Trial by G.C.M., convened at Fort Sam Houston, Texas, 13 March 1945. Dismissal.
	)	
Captain MARVIN E. SULLIVAN (01549127), Ordnance Department.	)	

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OPINION of the BOARD OF REVIEW
ANDREWS, FREDERICK and BIERER, Judge Advocates.

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1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that Captain Marvin E. Sullivan, Headquarters, Fourth Army, did, at Wagoner, Oklahoma, on or about 19 February 1945, wrongfully, unlawfully and bigamously marry Mrs. Maude M. Conney, having at the time of said marriage to Mrs. Maude M. Conney, a lawful wife then living, to wit, Claudine C. Sullivan.

He pleaded not guilty to and was found guilty of the Charge and Specification. He was sentenced to dishonorable discharge (sic), total forfeitures and confinement at hard labor for one year and one day. The reviewing authority approved only so much of the sentence as involves dismissal from the service and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution established the following state of facts.

The accused officer and Mrs. Claudine Ostrander Sullivan were lawfully married at Visalia, California, on 10 January 1942 (R. 6; Ex. A, Ex. B; R. 7; Ex. C). To the best of the knowledge of Mrs.

Sullivan's mother, the marriage relation was never terminated, and about 19 February 1945, the parties were still living together as husband and wife at San Antonio, Texas (R. 6; Ex. A). The official public records in the office of the Court Clerk of Wagoner County, Oklahoma show a marriage license and certificate of marriage issued, returned and recorded 19 February 1945, certifying a marriage ceremony on that date at Wagoner, Oklahoma, between Marvin E. Sullivan, of Fort Sam Houston, San Antonio, Texas, aged 34 years, and Maude Moore Coney, of Camp Gruber, Oklahoma, aged 35 years, performed by Walter M. Odom, Justice of the Peace (R. 7; Ex. D; R. 8; Ex. E, Ex. F).

4. The accused testified (R. 8). He has been in the service approximately seven years, from 1932 to 1935 and since 1941. He served in enlisted status until commissioned through Officer Candidate School, Ordnance (R. 9).

On 18 February 1945, the accused went from Fort Sam Houston, Texas, to Camp Gruber, Oklahoma, arriving there in the afternoon (R. 9). The day being Sunday, he looked up friends he knew from previous occasions at Camp Gruber and had some drinks successively with three of them, finishing a bottle with the third, Lieutenant Churchill. The accused made "dates" for Miss Coney, whom he had met previously at Camp Gruber, to go with him to the officers' club and bring a girl friend for Lieutenant Churchill. The two officers called for the girls at the civilian quarters on the post, after having sandwiches (R. 10), and the four went to the club. Lieutenant Churchill had a bottle. They got a table and setups and started dancing and drinking. The subject of marriage was discussed in a joking manner, not seriously. As the dancing and drinking went on through the evening, at some point the accused lost all memory of what occurred. He remembers only riding in a car, climbing some stairs, and signing some kind of a book (R. 11). The next morning he woke up in bed and there was Miss Coney. He said, "What the hell are you doing here?" She said, "We were married." He said, "Married? Where?" She said, "Wagoner." She showed him a ring, which was his own wedding ring. It did not fit her (R. 46). Befuddled, he tried to collect his wits and figure out what had happened. When he had washed his face and cleaned up, Miss Coney was dressed (R. 11). She got a friend to drive them out to Camp Gruber. There he worked all day and thought over his situation, not knowing what to do or say. That evening Miss Coney picked him up at the officers' quarters and the two went back into Muskogee, to the officers' club at the Severs Hotel. He still did not know what to do, so kept his mouth shut until he could see an attorney. He went upstairs and went to bed. He did not have intimate relations with Miss Coney that night (R. 12). Accused paid the hotel bill, which was in the name of Mr. and Mrs. Sullivan. He did not see the register and does

not remember engaging the room. He and Miss Coney spent two nights there, the early morning of 19 February and the night of 19 February (R. 47). The next morning he went back to the post and there, with the help of a friend, made an appointment with a Muskogee lawyer for the next day, Wednesday. He did not see Miss Coney that night (R. 12). The next day he saw the attorney and arranged to institute annulment proceedings (R. 13). He found that Miss Coney was in a Muskogee hospital with pleurisy. He went to see her (R. 13) and found her in too much pain to do much talking, but her mother and uncle were there and quite hostile. The mother said, "What do you mean by doing this thing? Maude just lives for her work and her three children." He did not know she had any children. Maude's uncle was an attorney, and through him and the accused's attorney, an agreed annulment suit was instituted on behalf of Miss Coney and the marriage was annulled by decree in her favor 26 February (R. 14; R. 20, Ex. 1). Accused was returned to Fort Sam Houston and restricted to the post (R. 14). He attributed the affair to his intoxication, due to drinking heavily on a somewhat indisposed stomach and with nothing to eat on Sunday except a small steak sandwich in the evening (R. 14-16). He had met Miss Coney in October 1944, when on a mission at Camp Gruber, and had had three dates with her before Sunday, 18 February. He had had no correspondence with her by letter or telephone (R. 17). He had not told her that he was married. She found that out when she tried to get in touch with him on Tuesday evening, being so informed by the Adjutant, Headquarters, Special Troops, at Camp Gruber (R. 18, 19). In civilian life, accused was a police officer of Beverley Hills, California, and is on leave of absence from the Police Department while in the Army (R. 19).

Captain Churchill (R. 25), who accompanied the accused on the Sunday night in question, being then a first lieutenant (R. 40), testified that the accused had done rather extensive drinking and the two officers and the two girls were having "a hilarious party" (R. 27). He drove the accused and Miss Coney to Muskogee at their request. They talked about marriage, but the witness thought they were kidding (R. 27). Accused went into the police station, which is a high building where you have to climb a lot of stairs, and remained there for thirty to forty-five minutes, talking to policemen (R. 28). The party then drove to Wagoner, eighteen miles away. There the accused and Miss Coney went into the courthouse and stayed about fifteen minutes. Thence the party went to the house of a justice of the peace, and a marriage ceremony took place (R. 28). At the time, witness did not realize that the accused was drunk, but did so later (R. 29). His speech was clear and he did not stagger nor weave (R. 30). All four of the party drank about equally (R. 31). At the officers' club, the orchestra was interrupted and an announcement was made of the "engagement" of the accused and Miss Coney (R. 32). Witness considered it to be a jest (R. 32), "just kidding" (R. 33). Miss Coney went with the accused into the police station in Muskogee, where accused climbed the steps without any apparent trouble. The announced purpose was

to find where to get a marriage license. Witness and the other girl, Miss Conyers, waited outside, then the witness went in to get the accused and found him talking coherently with a group of police officers (R. 34). At Wagoner, they roused a night watchman, who directed them to the Court Clerk, and they roused the Clerk at home, who went with them to the court house to issue the license (R. 35). The court house is on street level, with no steps to climb on entering (R. 36). At the home of the justice of the peace, accused was feeling his liquor, but stood erect and spoke coherently at the ceremony (R. 37). All he had to say was, "I do" (R. 45). He was not in possession of his faculties, but the witness then thought that he "should" know what he was doing (R. 38). Witness did not attempt to interfere because both parties were of age and he thought they knew what they wanted. It was their business, drunk or sober. The witness was "just a first lieutenant", and not a guardian for anyone. They were out for a good time. Though the witness did not recognize it then, he is certain now that the accused was drunk (R. 40, 42, 44). Witness did not know that the accused was married (R. 33).

Mrs. Marvin E. Sullivan, wife of the accused, testified for the defense (R. 48). She and the accused have been married for three years and have one child. Accused had been working hard under great tension prior to his trip to Camp Gruber, and seemed unable to relax. She wanted him to get off somewhere, but he had no opportunity to do so. He reminded her of a volcano about to erupt. He needed a change to let off steam (R. 49, 50). She feels shocked and wronged by the matter here involved, but thinks that the tension he was under may account for it (R. 51). The accused is very impulsive, a dynamic personality (R. 52). She still lives with him as his wife (R. 52). After her first indignation, she is reconciled with the accused and standing by him. He has been a wonderful husband, thoughtful and helpful (R. 56, 57). Her mother interceded for him when he called her in California by telephone after he got in the trouble at Camp Gruber (R. 55).

Mrs. L. H. Clarke, the accused's wife's mother, testified by stipulation (R. 58; Ex. 5), that the accused has "an inept ability to handle intoxicants to the extent that he would be out on his feet, but it would be barely discernible to persons around him", and that he is of the highest moral character, with an excellent reputation for truth and veracity.

The Chief of Police of Beverly Hills, California, and the Chief, Criminal Division, Office of the Sheriff of Los Angeles County, California, by stipulation (R. 57; Ex. 2, 3), both gave testimonials to the excellent reputation of the accused for truth, veracity and high moral character, and to his diligent and efficient performance of his duties as a police officer.

Colonel Donald H. Galloway, General Staff Corps, Deputy Chief of Staff, Fourth Army, testified (R. 54) to exceptionally valuable service performed by the accused in preparing two companies to meet requirements for movement overseas.

Colonel F. C. Shaffer, Ordnance Department, by stipulation (R. 58; Ex. 4), testified to the same effect, and to the accused's excellent performance of his military duties and exceptional knowledge of armored and amphibious vehicles. Colonel Shaffer had been assured by Mrs. Sullivan that she was sticking by the accused. Colonel Shaffer would be pleased to have the accused under his command under any conditions, especially in combat.

Brigadier General B. F. Caffey, commanding 7th Headquarters and Headquarters Detachment, Special Troops, Fourth Army, at Camp Bowie, Texas, testified by stipulation (R. 58; Ex. 6), that the accused performed exceptionally fine work in a superior manner at his station, displaying outstanding traits of initiative, intelligence, loyalty, common sense, judgment and leadership. The witness would be glad to have the accused in his command.

5. The evidence clearly establishes that, at the time and place alleged, the accused officer committed bigamy as alleged. Being then lawfully married and residing with his wife and baby at Fort Sam Houston, Texas, his permanent station, he went to Camp Gruber, Oklahoma, on temporary duty. There, in the course of a Sunday drinking project beginning in the afternoon and extending far into the night, he went dancing and drinking with Mrs. Coney, a civilian employee at Camp Gruber, somewhat his senior and, unknown to him, the mother of three children. She did not know that he was married. He had been in Mrs. Coney's company on three previous occasions. Frolicking with another couple, the subject of "marriage" was discussed in jesting manner, and the jest turned into the semblance of reality possible under the circumstances as the accused and Mrs. Coney, with the other couple attending, went to the neighboring cities of Muskogee and Wagoner, awakened the Court Clerk at Wagoner, procured a marriage license, awakened a justice of the peace, and went through a purported marriage ceremony in the early morning hours of Monday, 19 February 1945. They spent the remainder of that night and the next night together at a hotel in Muskogee, registered as husband and wife, then instituted proceedings which resulted promptly in the annulment of the bigamous marriage. Sexual intercourse on the second night is denied by the accused, who was then trying to think his way out of his predicament and getting up his nerve to make the necessary disclosures. According to his own testimony, he was too drunk to know or remember what happened in that respect on the night of the bigamous marriage. Mrs. Coney did not testify.

The lawful wife of the accused, after her initial grief and shock over the affair, nobly and charitably forgave the accused, continued conjugal relations with him, and testified in his behalf that he was not himself by reason of overwork and emotional strain. His mother-in-law also defended him, testifying to his peculiar reaction to intoxication, that he might be "out on his feet", but his intoxication would barely be discernible to observers.

The circumstances testified to by the other officer on the drinking party, that the accused was sufficiently in control of himself to conduct the negotiations necessary to procure the license and to carry it into purported execution, tend to refute the proposition that the accused did not know what he was doing. That officer, a witness for the defense, thought at the time in question that the accused was measurably in possession of his faculties, but later realized that the accused must have been drunk. It is reasonable to suppose that the capacity of the witness for reliable observation in such matters was not unimpaired by his own equal participation with the accused in the alcoholic indulgence of the day and night.

On the whole record, appraising the circumstances of the case, with due regard for the excellent previous record of the accused, military and domestic, affirmatively appearing in the evidence, and for the probabilities inherent in the situation, this Board is convinced that the mental faculties of the accused were so impaired by his intoxication at the time of the offense that he was actually oblivious to the significance of his acts and conduct, and was incapable of forming a specific intent. But bigamy does not require a specific intent. This is established by the authorities in cases where erroneous belief in good faith in the dissolution of a previous marriage is held to constitute no defense. This rule rests solely upon the proposition that specific intent is not an element of bigamy, unless made so by particular statute (CM 245510, Carusone, 29 BR 195, 197; 10 CJS 366, Title "Bigamy", sec. 6). Such is the prevailing American view, contrary to the English view (7 Am. Jur. 758, Title "Bigamy", sec. 16).

In our opinion, bigamy ordinarily does require the conscious performance of the prohibited act - the exercise of volition, the general intent to do the thing forbidden (10 CJS 366, 7 Am. Jur. 758). Thus, real duress is recognized as a defense (7 Am. Jur. 766, Title "Bigamy", sec. 7), as, it is believed, somnambulism or somnolentia could be (22 CJS 130, Title "Criminal Law", sec. 64). However, this requirement is met by the affirmative rule of law that voluntary intoxication is not an excuse for crime (par. 126a, MCM 1928, p. 136).

> "Broadly speaking, voluntary intoxication affords no defense to a charge of crime committed under its influence, and the law supplies by construction the essential criminal

intent where none is actually present" (except specific intent where requisite to constitute the particular crime). * * *

"The effect of drunkenness on the mind and on men's actions when under the full influence of liquor are facts known to everyone, and it is * * * the duty of men to abstain from placing themselves in a condition from which * * * danger to others is to be apprehended. * * * It can make no difference, where no specific intent is necessary, that the intoxication was so extreme that accused was unconscious of what he was doing and had no capacity to distinguish between right and wrong, and, although there may be no actual criminal intent, the law will, by construction, supply the same, except in cases where a specific intent is requisite. Accused may be entirely unconscious of what he does and yet be responsible. * * *" 22 CJS 130, 131, Title "Criminal Law", sec. 66.

"Voluntary intoxication does not excuse the commission of crime. A rule almost universally recognized and applied is that a person who, being sane and responsible for his acts, voluntarily becomes intoxicated, with or without a preconceived design to commit a crime, and while intoxicated, though it is to such a degree as to render him wholly oblivious to his acts or conduct, does any act which, if done by a person capable of distinguishing between right and wrong, would be criminal if not excused or justified in some way is responsible for his act, notwithstanding his mental condition at the time". 15 Am. Jur. 27, Title "Criminal Law", sec. 338.

Thus it appears that this rule in its full significance is more than the mere negation of a defense. It is a proposition of law that the general requirement of mens rea - the guilty mind which characterizes particular conduct as criminal - shall not be applied to relieve from responsibility one who has so rendered himself irrational by misconduct of his own choice. The exception as to specific intent, in cases where it is applicable, is carved out by long-settled authority as the point beyond which the rationale of the rule, with which the exception is logically inconsistent, will not be accepted. The rule is one of pragmatic derivation, based on the experience that much of the misconduct with which the administration of justice commonly has to deal arises from excess and abuse in the consumption of intoxicants, and the deterrent purpose of the criminal law will not, as a practical proposition, permit the

acceptance as an excuse of the very practice which tends to suspend natural inhibitions and set men's baser impulses free to impel their acts of crime.

Accordingly, the record is legally sufficient. That, upon this record, the persons concerned are not complaining; that the only unforgiven injury is that done to society's interest and policy, and that the quality of an offense against the institution of the family, which ordinarily characterizes the crime of bigamy, appears largely to have lost punitive significance in this case, leaving legal sufficiency a somewhat bare and sterile condition, are considerations outside the scope of the present inquiry, for appropriate consideration in the due course of military justice.

6. The accused officer is 31 years of age, married, with one minor child. He is a native and resident of California. After graduation from high school in 1931, he served a term of enlistment in the regular Army from 1932 to 1935. In civilian life he operated a gasoline station briefly, worked for one year as an investigator for William J. Burns Detective Agency, and was a police officer of the city of Beverly Hills, California, from 1937 to 1941. He reentered the service 16 July 1941 and, after service in noncommissioned status, was appointed a second lieutenant, Army of the United States, Ordnance Department, through Ordnance School, Aberdeen Proving Ground, Maryland, 5 September 1942. He advanced to the grade of first lieutenant by promotion 20 May 1943 and to that of captain 5 October 1944. To that time, serving as Instructor, Test Officer, Proof Officer, and Assistant Ordnance Officer, he received one rating of very satisfactory and four of excellent. At the trial of the present case, testimony of a general officer and two colonels avouched his performance of exceptional service and his highly creditable military record prior to the present offense. Strong character testimony in his behalf was given by police authorities of Beverly Hills, California.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

(Sick in quarters), Judge Advocate.

Herbert R. Friederich, Judge Advocate.

[illegible], Judge Advocate.

SPJGQ-CM 277686 1st Ind

Hq ASF, JAGO, Washington 25, D.C. JUN 1 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Marvin E. Sullivan (01549127), Ordnance Department.

2. Upon trial by general court-martial this officer was found guilty of bigamy, in violation of Article of War 96. He was sentenced to dishonorable discharge (sic), total forfeitures and confinement at hard labor for one year and one day. The reviewing authority approved only so much of the sentence as involves dismissal from the service, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I concur in that opinion.

The accused officer, then lawfully married and residing with his wife and baby at Fort Sam Houston, Texas, went on temporary duty to Camp Gruber, Oklahoma. Arriving there on Sunday afternoon, 18 February 1945, he entered upon a course of alcoholic indulgence with a fellow officer, which developed, as the evening and night wore on, into a drinking and dancing party with two women, civilian employees of the post, at Muskogee, Oklahoma. In the course of the festivities, a proposition of marriage between the accused and his companion, begun in jest, eventuated in a ceremony of their purported marriage in the early morning hours of 19 February at Wagoner, Oklahoma, performed by a justice of the peace awakened for the purpose after the court clerk had been awakened to issue the marriage license. The other couple attended as witnesses. Accused and his companion then spent the remainder of that night and the following night at a Muskogee hotel, registered as husband and wife. The accused testified that he was too drunk to know or remember any of the events of the night of the purported marriage, except climbing some stairs and signing a book. He denied any sexual intercourse on the next night, which he spent in contemplation of his predicament and deliberation concerning his extrication therefrom. Proceedings which resulted in the early annulment of the bigamous marriage were arranged for on the following day. The officer who accompanied the accused on the night in question then believed that the accused was in possession of his faculties, but later realized that the accused

was drunk. Neither the accused's female companion nor the other woman in the party testified. The wife of the accused, after her initial natural reaction to the affair, forgave him and continues to live with him. She testified in his defense at the trial, attributing his dereliction to emotional disturbance due to overwork. The bigamous wife is somewhat older than the accused, and is the mother of three children. She did not know that the accused was married, nor did he know about her children. The accused's good previous reputation and excellent military record are affirmatively in evidence. His superiors regard him as an exceptionally valuable officer.

I recommend that the sentence as approved by the reviewing authority be confirmed but commuted to a reprimand and a forfeiture of $50 pay per month for a period of six (6) months, and that the sentence as thus commuted be carried into execution.

4. Consideration has been given to letters attached, as follows: Letter of Mrs. L. H. Clarke, mother-in-law of the accused, 1276 Vagedes Street, Fresno, California, addressed to Honorable Bertrand W. Gearhart, Member of Congress; letter of Mr. Gearhart dated 3 April 1945, with inclosures returned at his request; letter of Mrs. Vada C. Russell, mother of the accused, 3446 Descanso Drive, Los Angeles, California, dated 28 March 1945, addressed to the Secretary of War.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

Myron C. Cramer

MYRON C. CRAMER
Major General,
The Judge Advocate General

5 Incls
1 - Record of trial
2 - Form of action
3 - Cy ltr fr Mrs. L. O. Clarke 30 Mar 45
4 - Cy ltr fr Mr. Gearhart 3 Apr 45
5 - Ltr fr Mrs. V.C. Russell 28 Mar 45

(Sentence as approved by reviewing authority confirmed, but commuted to reprimand and forfeitures. As commuted ordered executed. GCMO 314, 7 July 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGH-CM 277697

5 APR 1945

UNITED STATES v. Private MILTON LEATHE (31315559), 3828th Quartermaster Truck Company.	14TH HQ AND HQ DETACHMENT SPECIAL TROOPS, SECOND ARMY Trial by G.C.M., convened at Camp Shelby, Mississippi, 13 March 1945. Dishonorable discharge and confinement for fifteen (15) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
TAPPY, GAMBRELL and TREVETHAN, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 64th Article of War

Specification: In that Private Milton Leathe, 3828th Quartermaster Truck Company, having received a lawful order from 1st Lieutenant Edward Shapiro, QMC, his superior officer, to wit, to report to the kitchen at once for duty, did, at Camp Shelby, Mississippi, on or about 23 February 1945, willfully disobey same.

CHARGE II: Violation of the 65th Article of War

Specification: In that Private Milton Leathe, 3828th Quartermaster Truck Company, having received a lawful order from Staff Sergeant Raymond Washington, who was then in the execution of his office, to wit, to report to the kitchen for duty, did, at Camp Shelby, Mississippi, on or about 23 February 1945, willfully disobey same.

CHARGE III: Violation of the 96th Article of War

Specification: In that Private Milton Leathe, 3828th Quartermaster Truck Company, with the intent to avoid military duty in time of war, did, at Camp Shelby, Mississippi, on or about 23 February 1945, feign illness, to the prejudice of good order and discipline in the military service.

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of any previous conviction was introduced. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for 15 years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification, legally sufficient to support the findings of guilty of Charge II and its Specification, and legally sufficient to support the sentence. The only question requiring consideration here is whether or not the record of trial is legally sufficient to support the findings of guilty of Charge III and its Specification.

The Specification of Charge III alleges that accused, with intent to avoid military duty in time of war, did, at Camp Shelby, Mississippi, on or about 23 February 1945, feign illness, to the prejudice of good order and discipline in the military service." The proof in support of this allegation is that accused was not on sick call 23 February 1945 and had not been on sick call at any time for ten days prior thereto. He didn't appear to be ill according to the testimony of his commanding officer, who was not a medical officer. Accused's battalion surgeon testified that accused was on sick call 27 February 1945 and that an examination made on that date revealed that accused had chancres on his penis and was suffering from acute gonorrhea and primary syphilis. He further testified that the period of incubation for syphilis is from 14 to 18 days and that accused could have been ill because of these diseases on 23 February 1945. Usually the victim's glands swell and pain in the groins result. Accused could have had these pains on 23 February 1945.

4. Accused having had his rights as a witness fully explained, elected to be sworn and testified in his own behalf to the effect that he was ill on 23 February 1945 and refused to wash the mess hall windows as ordered because of his illness and inability to climb a ladder. He did not go on sick call on 23 February because he had been "disappointed" once before. He had not been on sick call within ten days prior to 23 February 1945.

5. The proof falls far short of showing that accused was feigning illness on 23 February 1945 as alleged. On the contrary, and by the testimony of the battalion surgeon, who was a witness for the prosecution, it was shown that when accused was given a physical examination, on 27 February 1945 he had chancres on his penis and was diagnosed as having acute gonorrhea and primary syphilis. It was also shown that syphilis incubation is from 14 to 18 days before the chancres occur. Hence accused must have had syphilis on 23 February 1945, and it seems quite likely that he was on that date suffering from pain in the groins as a result of his swollen glands. It was incumbent upon the prosecution to show that accused was not in fact suffering from illness on 23 February 1945. This the prosecution failed to do. The evidence does not sustain the findings of guilty of Charge III and its Specification.

6. For the reasons stated above, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Charge III and its Specification, but legally sufficient to support the findings of guilty of all other Charges and Specifications and legally sufficient to support the sentence.

Thomas N. Tally, Judge Advocate

William A. Cambrell, Judge Advocate

Robert C. Trevellian, Judge Advocate

SPJGH-CM 277697 1st Ind

Hq ASF, JAGO, Washington 25, D. C.

TO: The Commanding Officer, 14th Headquarters and Headquarters Detachment, Special Troops, Second Army, Camp Shelby, Mississippi.

1. In the case of Private Milton Leathe (31315559), 3828th Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Charge III and its Specification, but legally sufficient to support the findings of guilty of all other Charges and Specifications and legally sufficient to support the sentence, which holding is hereby approved. Upon vacation of the findings of guilty of Charge III and its Specification you will have authority to order the execution of the sentence.

2. In view of the physical condition of accused at the time of the commission of the offenses and the absence of any record of previous convictions it is recommended that the period of confinement be reduced to five years.

3. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference, please place the file number of the record in brackets at the end of the published order, as follows:

(CM 277697).

1 Incl
Record of trial.

MYRON C. CRAMER
Major General
The Judge Advocate General

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGH-CM 277798

10 APR 1945

UNITED STATES	)	I TROOP CARRIER COMMAND
	)	
v.	)	Trial by G.C.M., convened at George Field, Lawrenceville, Illinois, 16 March 1945. Dismissal and total forfeitures.
	)	
Second Lieutenant RUDOLPH M. NELSON (0-547837), Air Corps.	)	

OPINION of the BOARD OF REVIEW
TAPPY, GAMBRELL and TREVETHAN, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General:

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 93d Article of War

Specification 1: In that Second Lieutenant Rudolph M. Nelson, Squadron C, 805th Army Air Forces Base Unit, did, at George Field, Lawrenceville, Illinois, on or about 12 January 1945, with intent to defraud, falsely make, in its entirety, a certain check in the following words and figures, to wit:

"BANK OF AMERCIA (sic) 11 33
~~THE-PEOPLES-NATIONAL-BANK-70-752~~
~~In-Lawrenceville~~
San Francisco, Calif

San Francisco, Calif
~~LAWRENCEVILLE,-ILLINOIS~~, Jan 12, 1945
Market & Castro Branch

PAY TO THE ORDER OF CASH $10 00/xx

Ten and no/100----------DOLLARS
Value Received and Charge to Account of With Exchange

TO _____ 151006

_____ 4-22 FREDIE C. CHAPMAN
2nd Lt. 0-584331"

Unable to locate at
Castro & Market Branch

Sqd "C"

which said check was a writing of a private nature which might operate to the prejudice of another.

Specification 2: Same allegations as Specification 1 except draft drawn on or about 17 January 1945 on First National Bank, Denver, Colorado, to the order of George Field Exchange, in the amount of $25, and bearing name of Charles J. Nolan, Second Lieutenant, as maker.

Specification 3: Same allegations as Specification 2 except draft drawn on or about 15 January 1945 on Bank of America, Sacramento, California, and bearing name of Donald C. Roberts, Second Lieutenant, as maker.

Specification 4: Same allegations as Specification 3 except draft drawn on or about 12 January 1945 on Bank of America, Oakland, California, and bearing name of John C. Roberts, Second Lieutenant, as maker.

CHARGE II: Violation of the 95th Article of War

Specification: In that Second Lieutenant Rudolph M. Nelson, Squadron C, 805th Army Air Forces Base Unit, did, at George Field, Lawrenceville, Illinois, on or about 15 January 1945, with intent to defraud, wrongfully and unlawfully make and utter to The Peoples National Bank, Lawrenceville, Illinois, a certain check in words and figures as follows, to wit:

"THE PEOPLES NATIONAL BANK 70-752 5
In Lawrenceville

LAWRENCEVILLE, ILLINOIS, Jan 15, 1945

The Peoples National Bank
PAY TO THE ORDER OF in Lawrenceville, Illinois $25.00

Twenty Five and no/100 ---------- DOLLARS
Value Received and Charge to Account of With Exchange

TO BANK OF AMERCIA (sic) RUDOLPH M. NELSON
2nd Lt. 0-547837
San Francisco, Calif.
Sqdn C"
11 35

and by means thereof did fraudulently obtain from said Peoples National Bank, Lawrenceville, Illinois, Twenty-five Dollars ($25.00) he, the said Second Lieutenant Rudolph M. Nelson, then well knowing that he did not have and not intending that he should have any account with the Bank of America, San Francisco, California, for the payment of said check.

Accused pleaded guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures and confinement for two years. The reviewing authority approved only so much of the sentence as provides for dismissal and total forfeitures and forwarded the record of trial for action under Article of War 48.

3. a. Charge I, Specification 1:

It was stipulated by the prosecution, defense and the accused that if Captain Edward M. McKay were present he would testify that he was Officers' Club Officer at George Field, Lawrenceville, Illinois, and that a check dated 12 January 1945, drawn on the Bank of America, San Francisco, California, in the amount of $10 and signed "Fredie C. Chapman, 2nd Lt. 0-584331" was presented to and cashed by the officers' club and was returned unpaid by the drawee bank, and that subsequently he (Captain McKay) received "the sum of $10.00 in cash in full payment of the said check from 2nd Lt. Robert (sic) M. Nelson" (R. 7; Pros. Ex. D).

b. Charge I, Specifications 2, 3, 4:

It was also stipulated by the prosecution, defense and the accused that if Captain Alfred H. Wagman were present he would testify that as Post Exchange Officer he received the following three checks which were cashed by his organization, viz (R. 6, 7; Pros. Exs. A, B, C):

Spec.	Date of Check	Amount	Payee	Drawee Bank	Drawer's Name
2	17 Jan 45	$25	George Field Exchange	First Natl Bank, Denver, Colo.	Charles J. Nolan 2d Lt. 0-856623
3	15 Jan 45	$25	"	Bank of America, Sacramento, Calif.	Donald C. Roberts 2d Lt 0-678788
4	12 Jan 45	$25	"	Bank of America, Oakland, Calif.	John C. Roberts 2d Lt. 0-847711

These three checks were returned unpaid by the drawee bank and subsequently full restitution was made thereon (R. 7).

c. Charge II, Specification:

It was further stipulated by the prosecution, defense and the accused that if Miss Mildred E. Bailey were present she would testify that she was cashier of the George Field branch of the Peoples National Bank in Lawrenceville, Illinois, that she cashed a check payable to the order of Peoples National Bank, dated 15 January 1945, in the amount of $25, drawn on the Bank of America, San Francisco, California, and signed "Rudolph M. Nelson, 2nd Lt. O-547837", and that said check was returned marked "No Account" by the drawee bank and that subsequently said bank was paid the sum of $25 by "2nd Lt. Robert (sic) M. Nelson" to redeem the check (R. 7, 8; Pros. Ex. E).

A voluntary statement was made by accused to the investigating officer after his rights had been fully explained to him. Accused admitted that he made and cashed all of the five checks covered by the Charges and Specifications although he had no funds on deposit to pay them in any of the drawee banks. He admitted that he wrote the names of fictitious drawers when he made the four checks covered by Charge I and that he wrote the check covered by Charge II on a bank in which he did not have an account. He cashed the check covered by Specification 1 of Charge I at the Officers' Club, George Field, cashed the three checks covered by Specifications 2, 3 and 4 of Charge I at the George Field Post Exchange, and cashed the check covered by the Specification of Charge II at the George Field branch of the Peoples National Bank. Subsequently he redeemed all of these checks. He further stated that he cashed these checks because of maternity expenses incurred on the birth of his child in October 1944, because of medical expenses incurred as a result of accidental injuries suffered by his wife "about Christmas time" and because of additional expenses involved in transporting his wife and baby to Illinois when the latter was about six weeks old. When confronted with these worthless checks he promptly admitted making them and thereafter redeemed them (R. 9, 9a; Pros. Ex. F).

4. After his rights had been explained to him accused elected to remain silent, stating that his confession included everything he had to say (R. 9a). Accused's Form 66-2 was admitted in evidence and demonstrated that accused qualified as a glider pilot in January 1943, served on Guadalcanal from June 1943 to December 1943, and received four performance ratings subsequent to January 1943, all of which were Excellent (R. 9a; Def. Ex. 1).

5. The prosecution's evidence, including accused's confession, fully establishes his commission of the offenses alleged and demonstrates that accused's pleas of guilty to all Charges and Specifications were not improvidently entered.

6. Accused is 25 years of age, married and the father of one child. War Department records reveal that in civilian life he was employed as

supervisor of his uncle's ranch comprising some 3200 acres and also played professional baseball with a minor league team. He enlisted in the Army on 29 December 1941, and on 25 January 1943 was appointed a flight officer, AUS, after having completed the prescribed course in advanced glider pilot training at Army Air Forces Glider School, Delhart, Texas. During his six months service overseas, presumably on Guadalcanal, he logged 100 hours as pilot of L-5 type aircraft and 350 hours as co-pilot of C-47 type aircraft. He was commissioned a second lieutenant on 23 March 1944.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence, as approved by the reviewing authority, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 93 and is mandatory upon conviction of a violation of Article of War 95.

Thomas H. Taffe, Judge Advocate

William H. Gambrell, Judge Advocate

Robert C. Trueblood, Judge Advocate

SPJGH-CM 277798 1st Ind

16 APR 1945

Hq ASF, JAGO, Washington 25, D. C.

TO: The Secretary of War

1. Herewith are transmitted for the action of the President the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Rudolph M. Nelson (0-547837), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, as approved by the reviewing authority, and to warrant confirmation of the sentence. I recommend that the sentence as approved by the reviewing authority be confirmed but that the forfeitures be remitted and that the sentence as thus modified be carried into execution.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

3 Incls
1. Record of trial
2. Dft ltr for sig S/W
3. Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence as approved by reviewing authority confirmed, but forfeitures remitted, Sentence as modified ordered executed. GCMO 207, 11 June 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGK - CM 277799

13 APR 1945

UNITED STATES V. Second Lieutenant HARRY S. DOWD (O-574442), Air Corps.	FAIRFIELD AIR TECHNICAL SERVICE COMMAND Trial by G.C.M., convened at Wright Field, Dayton, Ohio, 14 March 1945. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
LYON, HEPBURN and MOYSE, Judge Advocates.

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 61st Article of War.

Specification 1: In that Second Lieutenant Harry S. Dowd, Air Corps, 4020th Army Air Forces Base Unit, then assigned to Headquarters and Base Services Squadron, 81st Service Group, did, without proper leave, absent himself from his station at Stinson Field, Texas, from about 16 September 1944 to about 19 September 1944.

Specification 2: In that Second Lieutenant Harry S. Dowd, * * *, did, without proper leave, absent himself from his station at Wright Field, Dayton, Ohio, from about 13 December 1944 to about 16 January 1945.

CHARGE II: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Harry S. Dowd, * * *, did, at Dayton, Ohio, Fort Thomas, Kentucky, Cincinnati, Ohio, and Chicago, Illinois, from about 1 December 1944 to about 16 January 1945, wrongfully and unlawfully make and utter to various parties about twenty (20) checks, individually varying in amount from about ten dollars ($10.00) to about one hundred seventy-five dollars ($175.00) and aggregating in total amount about six hundred seventy-eight dollars ($678.00), all drawn upon the National Bank of Fort Sam Houston, San Antonio, Texas, he, the

said Second Lieutenant Harry S. Dowd, then well knowing that he did not have, and not intending that he should have, sufficient funds in the National Bank of Fort Sam Houston, for honoring each such check upon its presentation for payment.

Specification 2: In that Second Lieutenant Harry S. Dowd, Air Corps, * * *, did, at Chicago, Illinois, on or about 16 January 1945, wrongfully appear in improper uniform, to wit: while wearing service ribbon indicating award of the Purple Heart.

3. He pleaded guilty to Charge I and its Specifications and to Specification 2 of Charge II, and not guilty to Charge II and Specification 1 thereof, and was found guilty of all Charges and Specifications, except, in Specification 1 of Charge II, the word "twenty" and the figure "(20)," substituting therefor respectively the word "thirteen" and the figure "(13)," and except the words "six hundred seventy-eight dollars" and the figure "($678.00)," substituting therefor respectively the words, "five hundred fifty-five dollars and eighty-three cents" and the figures "($555.83)." No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

4. Summary of evidence.

a. For the prosecution.

It was stipulated that accused was in the military service of the United States and had been in such service continuously since some time prior to 16 September 1944; that during the period from about 16 September 1944 to about 19 September 1944 he was assigned to Headquarters and Base Services Squadron, 81st Service Group, with station at Stinson Field, Texas; and that during the period from about 13 December 1944 to about 16 January 1945 and at the time of the trial he was a member of the 4020th AAF Base Unit, stationed at Wright Field, Dayton, Ohio (Pros. Ex. 4).

Specifications 1 and 2, Charge I (two absences without leave).

By his plea of guilty, accused admitted the two unauthorized absences, as set forth in these specifications. His guilt of these offenses was further established by duly authenticated extract copies of the morning reports of his organizations, introduced in evidence without objection, showing his initial absence from and return to Stinson Field, and his initial absence from Wright Field and the stipulation that he was returned to military control on 16 January 1945 (Pros. Exs. 1,2,3, and 4).

Specification 2, Charge II (Wrongfully appearing in improper uniform

by wearing Purple Heart Ribbon).

Supplementing the plea of guilty of this Specification, it was stipulated that on 16 January 1945 accused was not authorized to wear a service ribbon indicating the award of the Purple Heart and that if First Lieutenant Michael Roth were present, he would testify that he is a member of the Chicago Military Police Detachment and that on that date he saw accused wearing this unauthorized ribbon in Chicago (Pros. Ex. 4).

Specification 1, Charge II (wrongful and unlawful issuance and utterance of 20 checks without sufficient funds).

It was stipulated (Pros. Ex. 4) that twenty-one checks, aggregating $688.35, attached to the written stipulation as attachments 1 to 21, all drawn on the National Bank of Fort Sam Houston, San Antonio, Texas, were signed by the accused and were uttered by him to the specified payees, at various places and on various dates between 1 December 1944 and 15 January 1945, in amounts ranging from $5.00 to $175.83, all as detailed in the stipulation; that at the times said checks were made and uttered the accused did not have sufficient funds in the drawee bank to pay these checks; that if the cashier of the said bank were present he would testify that the regularly maintained records of the bank show that accused had an account with the bank "but did not have sufficient balance to pay such checks on the dates of their execution and on the dates on which they were presented for payment;" and that the records of the bank "if present in court, would substantiate the aforesaid stipulated testimony of the cashier." Before the acceptance of this stipulation by the court, the law member, after remarking that the stipulated testimony was "pretty close to a plea of guilty" to this Specification, and that the sole admission omitted was accused's knowledge of whether or not he had "enough money," explained the significance of the stipulation to the accused and interrogated him as to his comprehension thereof as follows:

> "The substance of Specification 1 of Charge II is that you uttered and issued a number of checks, about 20 in number, aggregating a total sum of $678, when you did not have sufficient funds in the bank upon which you drew the checks to pay the checks and that you knew you did not have sufficient funds at that time. The stipulation which is presented here as Prosecution's Exhibit 4 admits everything necessary to the Specification except your knowledge that you did not have sufficient funds in the bank, you understand that is the effect of your stipulation?" (R. 8,9).

Accused specifically acknowledged his understanding of the effect of the stipulation and his desire that the stipulation stand. Thereupon the stipulation was accepted in evidence (R. 8,9).

First Lieutenant Herman Goldberg, the Investigating Officer, testified that he had explained accused's rights to accused, and that thereafter accused had made a statement concerning some of the checks involved in the charges against him (R. 10,11,12). At the time seventeen checks were attached to the charge sheet, and were examined by the accused, who later brought in four additional checks, these twenty-one checks being the same that are attached to the stipulation accepted in evidence as Prosecution Exhibit 4 (R. 12). Accused acknowledged that he had signed these checks and that no one other than himself had the right to draw against his account in the National Bank of Fort Sam Houston, on which he had drawn these checks. Accused likewise admitted that with the exception of the four checks which he had given to the Wright Field Officers' Club he "knew that the other checks were made with insufficient funds in his account to cover them." Accused's explanation of his actions was summarized by Lieutenant Goldberg as follows:

> "* * * [accused] stated that he had approximately a balance on about the 1st of December 1944 of $30, and it was about that period of time that he had made three of the checks to the Officers' Club here and one to the Wilbur Wright Officers' Club; at that time he thought he had sufficient funds in his bank account to make those four checks good, and had they been deposited promptly he believed that they would have been made good. He also had an arrangement whereby his account in that particular bank was increased by an allotment from his pay of $100, which was usually made about the 6th of each month. Therefore, on the 6th of December 1944 he would have had a balance of approximately $130, however after making these four checks he made two checks in the amount of $62 each and then one check in the amount of $25, plus a few other small checks, the amounts of which he did not remember; those checks were deposited and were honored; therefore, his bank account had been depleted in the amount of those checks, therefore, by the time these four checks arrived at his bank his account was insufficient to take care of them, that is why they were returned not honored. However, in making the other 17 checks he knew that he did not have sufficient funds on hand to take care of them. As I recall we figured out the checks involved or made during the period of 1 December 1944 to 16 January 1945, his bank account would have contained the $30 which he had therein on or about the 1st of December increased by a deposit of $100 on or about the 6th of December 1944, increased by a deposit of $100 on the 6th of January 1945" (R. 13).

Accused likewise stated to Lieutenant Goldberg that he intended to pay all of the checks which he had given and that he had already paid the entire indebtedness with the exception of about $150.00 (R. 15).

b. For the defense.

It was stipulated that accused had paid all of the twenty-one checks between 10 February and 2 March 1945 (Def. Ex. A). Accused's record of "military experience" as reflected by his AAF Officers' Qualification Record, was accepted in evidence by stipulation (Def. Ex. B). This record showed three ratings of "Excellent" between 2 May 1943 and 9 November 1943, followed by one of "Very Satisfactory" for the period ending 5 March 1944. For the period from 6 March 1944 to 7 May 1944, accused's rating was again "Excellent," but between 18 May and 26 September 1944 his rating was "Unsatisfactory." It was likewise stipulated that if First Lieutenant Arthur H. Tomes and Captain John E. McDonald, officers with whom accused had served, were present, they would testify to the marked efficiency with which accused had performed his military duties in Alaska, the Aleutians, Fresno, California, and Stinson Field, Texas, and to his "positive value to the military service" (Def. Exs. C and D).

After an explanation of his right to remain silent, to make an unsworn statement or to take the stand as an "ordinary witness," accused elected to testify under oath in his own behalf (R. 17). Accused stated that he was married and had one child. He had never been convicted by a civil or military court. He graduated from high school, and then worked for three years in order to accumulate a sufficient sum to attend Indiana University. After two years at that institution, realizing that war was near and that he would be unable to complete his education, he enlisted in the Army as a private on 21 March 1941 for service in Panama, in which country he arrived in May 1941 (R. 18). After nineteen months service there, during which he "arose rapidly to a Staff Sergeancy, and also to Personnel Sergeant Major," he was advised that he had the right to enter Officers' Candidate School, provided he passed the examination. Out of 200 applicants, he was one of twenty who successfully passed. Entering the school at Miami Beach on 12 December 1942, he graduated on 3 March 1943, and was immediately assigned to an overseas replacement center. (R. 18,19) He began foreign duty on 27 March 1943, going to Seward, Alaska, and thence to the Aleutian Islands as Assistant Personnel Officer of an air base. Following the American reoccupation of Attu, he was sent to a secret base in the combat area, where he remained until his transfer to the 372d Squadron for return to the United States. Shortly after his arrival in Seattle on Thanksgiving eve of 1943, he was assigned to Fresno, California, where he was appointed Mess and Supply and Transportation Officer, and later was given the additional duties of Orientation Officer and Group S-3 Officer for the 337th Service Group. During a subsequent period of desert training at Thermo, California, he likewise served as Acting Adjutant, receiving a "mark of excellent" for his work. From Fresno he was transferred to San Antonio (Stinson Field) where he was appointed "Consolidated Mess Officer" in addition to his other duties as Squadron Orientation Officer, Venereal Diseases Officer, and "any Squadron work in [his] capacity until [the squadron] got an adjutant" (R. 19,20-21).

His first absence without leave "was the direct result of misunderstanding," an explanation for which was offered by accused as follows:

"* * * I had been working quite late for several weeks, I had even worked Sunday; the Mess was the type that required quite a bit of work on my part. I had my wife and family in San Antonio, Texas and often arrived home late at night, this did not lead to perfect family life and upon Friday--the night before the AWOL occurred--I became involved in a very heated argument, relative to the type of duties I was doing out to the field, with my wife. Knowing that I couldn't help it because I couldn't get home earlier in the evening to spend more time with my family and because of the argument and being in the angry mood that I was, I left and went to town; the town being San Antonio, Texas; in town I began drinking and drank quite excessively and arrived home in the early morning hours of Saturday, September 16th; there involved another quarrel with my wife relative to my condition, so I immediately left again and being under the condition that I was at the time I went to town and became involved in more drinking, drinking most of the day Saturday and Saturday night. Knowing my status with the organization, knowing the duties that were usually occurring on Saturday, parade, inspection and orientation and so forth, knowing that orientation had been put off, that is had taken place on Friday, which I gave, knowing that the inspection was not going to be held due to the absence of Major Lane, and knowing that the parade had been put off due to adverse weather, I knew there were no absolute duties that I had at that time at the field. I had been with this organization for a long time and knew every man personally in this organization, and knew the duties of each since I was the Squadron Officer. I arrived home Saturday night, Sunday being the usual day off. It never occurred to me first that I was missed for AWOL and second that Sunday would be counted against me if I had of been. I received word Sunday that Major Lane had returned, had asked for me and had entered a charge of AWOL against me; becoming quite frightened, and I was frightened, that was the first mark of misconduct that had ever came up against me, I didn't know exactly what to do. However, Monday morning I left to go to work and became frightened and afraid to face my CO and returned home. My wife, realizing that it was a mistake and knowing that Major Lane had called the house, went to see my Commanding Officer to tell him the circumstances. Major Lane advised my wife for me to return and report to work on Tuesday morning at 8:00 to him. Therefore, on Tuesday morning at 8:00 I reported to Major Lane and Major Lane had entered a charge of AWOL for three days against my record" (R.21-22).

As a result of accused's absence without leave, "Major Lane [accused's commanding officer] on the morning of the 18th initiated a letter requesting [accused's] reclassification." That officer assured

accused that if it were in his power he would recall the letter "because he did not realize the circumstances." Later accused was given his choice of reclassification, demotion or resignation, and, since he did not wish to leave the service, he requested reclassification in the belief, based on his conversations with "Colonel Jackson" and Major Lane, that he would merely be reassigned to some other unit, probably in personnel work, in which he had previously been engaged, instead of mess management about which he "didn't particularly know too much." Major Lane gave accused an efficiency report which he had prepared as a necessary preliminary to reclassification and about a week later advised accused that it had become necessary to replace it with a less favorable one, as the original report, as drafted, did not justify reclassification. This later report was accepted in evidence as Defense Exhibit "E" (R. 22,23,24). Among other items the report contained the following remarks and opinion:

> "* * * Officer is capable of holding an assignment and doing good work therein, provided he does not let personal and outside interests and worries influence his judgment. In comparing this officer with all officers of his grade known to me, I would place him among the lower third. * * * This officer is performing duties commensurate with his grade. Believe outside interests, personal affairs, and worries have been basis of this officer's delinquencies. * * * Value to the Service: Officer's prior training should be utilized, believe with reclassification and change in command officer would be very valuable to service." (R. 23,24, Def. Ex. E)

In November accused was transferred to the Reclassification Center, Wright Field, arriving at that station on the 20th of that month. No official duties were assigned to him. For about three weeks he spent approximately two hours a day in collaboration with the defense counsel who had been assigned to him. He soon learned that his conception of reclassification was an erroneously optimistic one, and that "Reclassification in reality was the last chance an officer had before he was separated from the service" (R. 24, 25). He reached the conclusion that the burden of proving that "the reclassification was a mistake" rested on him and that the "court [board] was going on the assumption that if an officer was up for reclassification he had a good reason for being there and that anything he proved was just the difference between an honorable separation from the service or a separation without certificate of service" (R. 25). The reclassification proceedings were conducted on 11 December, and thereafter it was accused's understanding that he was merely to report to the Reclassification Center at nine o'clock in the morning each day, pending the receipt of "approval from Washington" of the board's "verdict." He reported on Tuesday morning, and then, realizing he had failed in his defense, he started drinking in Dayton, where he was living at the time, and continued to drink for ten days. "Thursday [he] couldn't stand very much more, mainly due to the condition brought on by [his] drinking, so without any further thought [he] boarded a bus and took

off for Cincinnati," taking nothing with him except the clothes he was wearing. He remained in Cincinnati nine days, during which time he did quite a bit of drinking, and was unable to "get up nerve enough" to return to Wright Field. While drinking with several civilians and an enlisted man who was going to the West Coast, he was successfully induced by the latter to go with him as far as Chicago, where he remained until his arrest by the Military Police on 16 January (R. 25,26,27). At no time during his absence did accused try to conceal his identity. He wore his uniform at all times and never intended "to run away from the military authorities" (R. 27).

With regard to his financial affairs, accused stated that he had transferred his savings from the Bank of America in Fresno, California, to the National Bank of Fort Sam Houston, to which he made a monthly "deposit allotment" of $100 for his own use, the balance of his pay and allowances being sent to his family. As a result of a large allotment to his wife while he was on overseas duty and of some savings by both prior to their marriage, there was built up an account of about $1200, which, while in his wife's name, was in reality a joint account, kept by her in a bank in Seymour, Indiana. In addition he had purchased in their joint names through allotments war bonds amounting to about $600, also held by his wife (R. 28). He knew that he did not have sufficient funds in the National Bank of Fort Sam Houston with which to "cover" the checks issued by him while he was absent without leave, but he needed the money for the expenses which he incurred, and as he knew that he was going back to Wright Field he had every intention of paying them when he got back there. He furnished his correct name, serial number, home address and station to each person to whom he issued a check in order to be certain that each could reach him (R. 29).

Accused stated that his unauthorized display on his uniform of the Purple Heart ribbon was the result of its having been jokingly pinned on him by an enlisted man with whom he was drinking and who noticed that accused had a bruised hand, the result of its having accidentally been caught in a car door. Accused had thoughtlessly left this ribbon on his blouse and had been wearing it for three days prior to his arrest. He was legitimately entitled to wear the ribbon representing the Good Conduct Medal, the Overseas Service ribbon, with one bronze star, for service overseas prior to Pearl Harbor, the American Theatre ribbon for 19 months service in Panama, and the Asiatic-Pacific ribbon, with one star, for combat duty in the Aleutians for eight months (R. 29).

On cross-examination by the Trial Judge Advocate and examination by the court, accused admitted that he had been absent without leave from his station from 13 December 1944 to 16 January 1945, that the twenty-one checks, attached to the stipulation, were dishonored by the drawee bank upon presentation, and that none of them was paid by "going through" the bank, accused having personally sent the cash to redeem them at a later date (R. 31,32,33).

5. Accused's guilt of the two absences without leave, made the basis of Specifications 1 and 2 of Charge I, requires no discussion, being fully established by accused's plea of guilty, the evidence introduced by the prosecution and the admissions made by accused. Accused's explanation of the reasons for his absence was clearly offered merely in extenuation of the offenses charged, and, moreover, would be unavailing were it offered as a defense. The same conclusion is applicable to Specification 2 of Charge II, involving accused's appearance in improper uniform, due to the unauthorized display on his uniform of the ribbon indicating the award of the Purple Heart. That the ribbon was originally pinned on accused's blouse by a third person in a joking spirit does not in any way excuse accused's action in continuing to wear it publicly for three days thereafter. The unauthorized wearing of the ribbon of any medal or decoration authorized by Congress or the War Department is prohibited by Federal statute (10 U.S.C. 1425) and by paragraph 12, Army Regulations 600-90, 24 February 1944 (now paragraph 14 of those regulations as reissued 3 February 1945). It has been held that to appear in public with an insignia of rank higher than that of the wearer is a public appearance in improper uniform, in violation of Article of War 96. (CM 247753, Davis, 31 B.R. 7.) It follows that accused's action in appearing in public with a ribbon on his blouse, representing a decoration not awarded to him, in violation of a Federal statute and Army Regulations, similarly constitutes an appearance in public in an improper uniform, for which he is subject to punishment under Article of War 96.

The evidence adduced by stipulation, the confession made by accused to the investigating officer, and accused's unqualified admissions in testifying as a witness fully support the conclusion reached by the court that accused wrongfully and unlawfully made and uttered thirteen checks, aggregating $555.83, to various parties and in various amounts, between about 1 December 1944 and about 16 January 1945, well knowing that he did not have and not intending that he should have sufficient funds in the drawee bank for honoring each of such checks on presentation for payment, as charged in Specification 1 of Charge II. As a matter of fact, as pointedly called to the attention of accused by the law member, the stipulated testimony admitted all elements of the Specification except accused's knowledge of the status of his account. What the stipulation lacked on this score was fully and completely supplied by accused's admission to the Investigating Officer, properly admitted in evidence, that, with the exception of the four checks given to the Wright Field Officers' Club, he knew that he did not have sufficient funds in the drawee bank to meet any of the 21 checks at the time of their issuance and utterance, by the reiteration of this admission, while testifying in his own behalf, and by the further admissions, while so testifying, that he procured the amounts represented by the checks for his necessary expenses while absent without leave, and that none of them had been honored by the bank upon presentation. No fraud was charged in connection with the issuance and

utterance of the checks, but it has been repeatedly held to be a violation of Article of War 96 for one in the military service to issue a check on a bank, knowing that there were not sufficient funds and not intending that there should be sufficient funds to meet such checks on presentation, even though an intention to defraud was absent. As stated in CM 249232, Norren, 3 Bull, JAG 290, 32 B.R. 95:

> "A member of the military establishment is under a particular duty not to issue a check without maintaining a bank balance or credit sufficient to meet it. Such conduct is not only a reflection on the individual and a violation of a civil law if committed with wrongful intent, but service-discrediting as well. Frequently checks are cashed not because of the assurance derived from the implied representation attached to the check so much as the faith created by the uniform. The individual may be satisfied by the exculpation which flows from an explanation rooted in carelessness or negligence. The hurt to the credit and reputation of the Army is not so easily removed.
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> * * * *
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> "It is the opinion of the Board of Review that proof that a check given for value by a member of the military establishment is returned for insufficient funds imposes on the drawer of the check, when charged with service-discrediting conduct, the burden of showing that his action was the result of an honest mistake not caused by his own carelessness or neglect."

Accused did not plead "honest mistake." On the contrary, he admitted that all except four of the checks were issued with full knowledge of the lack of funds in the bank. The court gave accused the benefit of every possible doubt, as evidenced by its finding that only thirteen, instead of twenty, checks were wrongfully and unlawfully issued, totaling $555.83, instead of $678.00, as charged. He offered no excuse other than that he intended to make good these checks at a later date when he eventually returned to Wright Field. The conclusion is inevitable that accused, through the utterance of the checks to various payees, wrongfully and illegally held out to them that he had sufficient funds to meet the checks upon presentation and obtained value therefor, well knowing that he had no such funds on deposit.

6. In holding the record legally sufficient, the Board takes cognizance of the fact that the Specification, as framed, fails to comply with some of the fundamental rules laid down in the Manual for Courts-Martial (1928) with regard to the preparation of Specifications (Par. 29 and Par. g of Appendix 4). Neither the dates nor places of issuance and utterance nor the names of the payees of the checks are given; neither the purpose for which they were issued nor the consideration received is alleged; and the only inference of any improper intent in connection with their issuance and utterance is that

which may be inferred from the use of the words "wrongfully and unlawfully" in the Specification. The Specification, therefore, lacks that clarity and completeness contemplated by the Manual. However, no objection was raised by the accused, and as the record shows affirmatively and unequivocally that he was fully apprised of the charges against him, that he was in no way taken by surprise, and that his substantial rights were in no way injuriously affected as a result of the inadequacy and vagueness of the Specification, there is no legal or equitable reason for holding the record of trial legally insufficient because of the deficiencies in the Specification (Article of War 37, and Pars. 73 and 87, MCM, 1928). It should be noted, however, that while a situation may arise, such as in the case of embezzlement over a period of time, in which it is impossible from a practical viewpoint to state definitely when the separate defalcations took place, this principle does not apply to the issuance and utterance of checks in varying amounts to various individuals at different times and for different purposes or considerations. Normally unconnected transactions should not be accumulated, but should the prosecution determine to accumulate a series of issuances and utterances of worthless checks in one specification so as in effect to charge a course of conduct in violation of good order and military discipline, the amounts, the dates of issuance, the parties to whom issued, and the purpose for which issued or the consideration received should be detailed, both to acquaint the accused with the specific derelictions with which he is charged and to furnish the basis for a plea of former jeopardy in the event of the subsequent filing of additional charges, based on the same checks. Since all of the checks were offered and identified in the present case, the possibility of any of them being made the basis of an additional charge has been eliminated.

The position of the Board in maintaining the sufficiency of the Specification is supported by the following views expressed by the Board of Review in CM 264296, Simms, in which accused was charged in one Specification with the issuance of eight checks, properly described:

> "'A specification alleging, as a violation of A.W. 95 a series of acts constituting a course of dishonorable conduct amounting to a fraud, is not objectionable on the ground of duplicity. C.M. 153268 (1922); 192530 (1930)' (Dig. Op. JAG, 1912-40, sec. 428 (13).
>
> "Similarly, a specification alleging, as a violation of Article of War 96, a series of acts constituting a course of action of a nature to bring discredit upon the military service, is not objectionable on the ground of duplicity. The test is whether the Specification is so framed as to advise the accused of the particular act or offense intended to be alleged, and to enable him to plead a former conviction or acquittal if subsequently brought to trial

on account of the same act (Winthrop's Military Law and Precedents, 2d Ed., p. 138). No basis exists in the instant case for a contention by the accused that he was in any way misled by the form of the specification, nor was any such contention made. Each of the eight checks alleged in the specification to have been wrongfully made and uttered was specifically described and was readily identifiable. Moreover, the Manual specifically provides (par. 87):

> 'No finding or sentence need be disapproved solely because a specification is defective if the facts alleged therein and reasonably implied therefrom constitute an offense, unless it appears from the record that the accused was in fact misled by such defect, or that his substantial rights were otherwise injuriously affected thereby.'"

7. War Department records show that accused is 26 years and 6 months of age and is married. (Accused testified that he has one child.) He graduated from high school and later attended Indiana University for one and one-half years, majoring in Business Administration. From October 1936, following his graduation from high school, until September 1939, he was employed in the operation of various automatic machines by the Chrysler Corporation, leaving his work to attend college. He enlisted in the Army 3 March 1941 and attained the rank of staff sergeant. On 25 November 1942 he entered Officer Candidate School, Army Air Forces Technical Training Command, Miami, Florida, and was commissioned a temporary Second Lieutenant on 3 March 1943, and assigned immediately to the Overseas Replacement Training Center, Kearns, Utah.

8. The court was legally constituted and had jurisdiction of the accused and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. A sentence of dismissal is authorized upon conviction of a violation of either Article of War 61 or 96.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGK - CM 277799 1st Ind.

Hq ASF, JAGO, Washington 25, D. C.

TO: The Secretary of War.

1. Pursuant to Executive Order No. 9556, dated May 26,1945 there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Harry S. Dowd (O-574442), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to and was found guilty of (1) two charges of absence without leave, for periods of three days and one month and three days, respectively, in violation of Article of War 61, and (2) public appearance in improper uniform by wearing the ribbon of the Purple Heart without authority, in violation of Article of War 96. In addition he pleaded not guilty to a specification charging him under Article of War 96 with the wrongful and unlawful issuance and utterance of twenty checks, totaling $678.00, to various parties between 1 December 1944 and 16 January 1945, well knowing that he did not have and not intending that he should have sufficient funds in the drawee bank for honoring them on presentation, and was found guilty of the offense as charged, except that the number of the checks was fixed at thirteen and the amount at $555.83. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence.

The accused pleaded guilty to both specifications under Charge I, one alleging absence without leave from about 16 September 1944 to about 19 September 1944 and from about 13 December 1944 to 16 January 1945, and imputed his first absence to overindulgence in liquor, following a quarrel with his wife, and his second and extended absence to a similar overindulgence induced by his brooding over the probability of his being reclassified and eliminated from the service. His sole explanation of the charge that he had worn the Purple Heart Ribbon without authority in public was that it had been pinned on him by an enlisted man in a joking spirit and that he had continued to wear it for three days thereafter until he was apprehended by the military authorities. It was amply proved by stipulated testimony, accused's admissions to the investigating officer, and his admissions in testifying in his own behalf that accused had made and uttered at least thirteen checks, totaling $555.83, referred to in Specification 1 of Charge II, with full knowledge that he did not have sufficient funds on deposit in the drawee bank for their

payment upon presentation. In justification of his action, accused stated that he intended to pay these checks, which he had issued during his unauthorized absence, upon his return to his station. At the time of the trial all of the indebtedness had been repaid. Accused's conduct is such as clearly to establish his unfitness to continue as an officer in the Army of the United States and to justify his dismissal. I recommend that the sentence, although inadequate, be confirmed but that the forfeitures be remitted and that, as thus modified, the sentence be carried into execution.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

Myron C. Cramer

2 Incls
1. Record of trial
2. Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed, but forfeitures remitted on recommendation of The Judge Advocate General, As modified ordered executed. GCMO 215, 13 June 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGN-CM 277800

U N I T E D S T A T E S	)	SECOND ARMY
	)	
v.	)	Trial by G.C.M., convened at Camp Mackall, North Carolina, 14 March 1944. Dishonorable discharge (suspended) and confinement for five (5) years. Rehabilitation Center.
Private LESTER J. HILL (33738480), Battery B, 467th Parachute Field Artillery Battalion.	)	

HOLDING by the BOARD OF REVIEW
LIPSCOMB, O'CONNOR and MORGAN, Judge Advocates

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1. The record of trial in the case of the soldier named above, having been examined in the office of The Judge Advocate General and there found legally insufficient to support the findings and sentence, has been examined by the Board of Review and held to be legally sufficient to support the findings and sentence.

2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that Private Lester J. Hill, Battery B, 467th Prcht FA Bn, did without proper leave, absent himself from his station at Camp Mackall, North Carolina, from about 4 February 1945 to about 19 February 1945.

3. The prosecution introduced in evidence an extract copy of the morning report of Battery B, 467th Parachute Field Artillery Battalion, Camp Mackall, North Carolina, which contained an entry concerning the accused, as follows:

"4 Feb 45
Hill, Lester J. 33738480 Pvt 7605
Asgd not jd AWOL 2200 per par 2 SO 30
27th Hq Special Troops Second Army Ft. Bragg
NC Race W AGF MCO 078" (R. 7; Pros. Ex. 1).

In addition, the commanding officer of Battery B testified that the accused was in the military service and was a member of Battery B, 467th Parachute Field Artillery Battalion, Camp Mackall, North Carolina (R. 6). There was also introduced into evidence an extract copy of the morning report of the 2521st Service Command Unit Station Complement Detachment #1, Army War College, Washington, D. C., which contained an entry as follows:

"19 Feb 45
Hill, Lester J. 33738480 Pvt
Btry B 467th Prcht F A Bn Cp Mackall NC
atchd & conf 1500 Willis M Burgess
Captain Infantry" (R. 6a; Pros. Ex. 2).

The accused, after his rights relative to testifying or remaining silent had been explained to him, elected to remain silent and no other evidence was presented (R. 6b).

4. The first of the above quoted morning report entries establishes, prima facie, the facts stated therein insofar as the commanding officer of Battery B, 467th Parachute Field Artillery Battalion was charged with the duty of knowing and recording them (MCM, 1928, par. 117a; 3 BR 344). As has been frequently stated by the Board of Review, the law presumes that public officers perform their duties as required by law, and this presumption prevails until the contrary is shown (MCM, 1928, par. 112a). Thus the Board of Review has held that:

> "It is the unqualified duty of a company commander to know what officers and men are assigned to his organization and to know their status, that is, whether present or absent, and, if absent, whether with or without leave. * * *.
>
> 'Morning report entries do not and are not intended to recite all preliminary or intermediate facts forming the basis of the authority for making them, and their administrative regularity must be and is presumed. For example, it is presumed, in the usual case, that the soldier was duly transferred to and assigned for duty with the organization from which the report reciting his absence without leave comes. It is only when the accuracy or regularity of the recital is impeached that the presumption falls' (quoted from C. 189682, Myers.

"The mere fact that there may be other sources of primary evidence as to the fact of accused's assignment to the 3rd Recruit Company, for example, the order so assigning him, does not alter the fact that the entry in the morning report is primary evidence. There may be and generally are many sources of primary evidence of facts sought to be established in criminal prosecutions or civil suits. The admissibility of the morning report entry as to assignment is established" (3 BR 344, Andrews).

Although the accuracy of the entries in the morning report under consideration could have easily been controverted, if untrue, the record presents no evidence which either impeaches or contradicts them. The entries in the morning report were admissible, therefore, to establish both the fact that the accused was assigned to Battery B, 467th Parachute Field Artillery Battalion, and also the fact that on 4 February 1945 he was absent without leave from that organization. In arriving at this conclusion the Board of Review has not overlooked CM 273922, Ortega, in which a contrary result was reached upon slightly different evidence.

The second of the two extract copies of the morning reports quoted above show that the accused was in confinement in Washington, D. C., on 19 February 1945. The Manual states that, "The condition of absence without leave with respect to an enlistment having been once shown to exist may be presumed to have continued, in the absence of evidence to the contrary, until the accused's return to military control under such enlistment" (MCM, 1928, par. 130a; 18 BR 221). Since the accused's unauthorized absence was shown to have begun on 4 February 1945, it may be presumed under this rule to have continued until his return to military control on 19 February 1945. The record is legally sufficient to sustain the court's finding that the accused was absent without leave from 4 February 1945 until 19 February 1945.

5. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the sentence.

Abner E. Lipscomb, Judge Advocate.

Robert J. Kamer, Judge Advocate.

Samuel Morgan, Judge Advocate.

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGQ-CM 277804

UNITED STATES	WARNER ROBINS AIR TECHNICAL SERVICE COMMAND
v.	Trial by G.C.M., convened at Daniel Field, Augusta, Georgia, 18 January 1945 and at Robins Field, Georgia, 13, 14, 15 February 1945. Dismissal, total forfeitures and confinement for two (2) years. Disciplinary Barracks.
First Lieutenant EARL C. WINGARD (O-573797), Air Corps.	

OPINION of the BOARD OF REVIEW
ANDREWS, FREDERICK and BIERER, Judge Advocates

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charges and Specifications:

CHARGE: Violation of the 61st Article of War.

Specification 1: In that First Lieutenant Earl C. Wingard, Air Corps, Section A, 4050th Army Air Forces Base Unit (Replacement Depot), Daniel Field, Georgia, did, without proper leave, absent himself from his organization and station at Daniel Field, Georgia, from about 1 August 1944 to about 8 August 1944.

Specification 2: In that First Lieutenant Earl C. Wingard, Air Corps, Section A, 4050th Army Air Forces Base Unit (Replacement Depot), Daniel Field, Georgia, did, without proper leave, absent himself from his organization and station at Daniel Field, Georgia, from about 11 August 1944 to about 23 August 1944 (amended to 22 August 1944).

ADDITIONAL CHARGE I: Violation of the 61st Article of War.

Specification: In that First Lieutenant Earl C. Wingard, Section A, 4050th Army Air Forces Base Unit (Replacement Depot), Daniel Field, Georgia, did, without proper leave, absent himself from his organization and station at Daniel Field, Georgia, from about 26 October 1944 to about 2 November 1944.

ADDITIONAL CHARGE II: Violation of the 95th Article of War.

Specification 1: In that First Lieutenant Earl C. Wingard, Section A, 4050th Army Air Forces Base Unit (Replacement Depot), Daniel Field, Georgia, did, at Moses Lake, Washington, on or about 8 May 1944, with intent to deceive, wrongfully and unlawfully make and utter to Mr. Mel Zornes, Moses Lake, Washington, a certain check, in words and figures as follows, to wit:

Kalamazoo, Mich. May 8 1944 No. 373

THE AMERICAN NATIONAL BANK
- of Kalamazoo -

Pay to the
Order of Mel Zornes $30.00

— Thirty and no/100 — DOLLARS

Earl C. Wingard

in payment of value received, he the said First Lieutenant Earl C. Wingard, then well knowing that he did not have and not intending that he should have sufficient funds in the said bank for the payment of said check.

Specification 2: Same form as Specification 1, but alleging check drawn on same bank, dated 31 May 1944, payable to order of Mel Zornes, made and uttered to Mel Zornes, at Moses Lake, Washington, in the amount of $200.00.

Specification 3: Same form as Specification 1, but alleging check drawn on same bank, dated 18 August 1944, payable to order of Atlanta Biltmore, made and uttered to Atlanta Biltmore (a hotel), Atlanta, Georgia, in the amount of $15.00.

Specification 4: Same form as Specification 1, but alleging check drawn on same bank, dated 19 August 1944, payable to order of Atlanta Biltmore, made and uttered to Atlanta Biltmore, Atlanta, Georgia, in the amount of $15.00.

Specification 5: Same form as Specification 1, but alleging check drawn on same bank, dated 19 August 1944, payable to order of Atlanta Biltmore, made and uttered to Atlanta Biltmore, Atlanta, Georgia, in the amount of $15.00.

Specification 6: Same form as Specification 1, but alleging check drawn on same bank, dated 21 August 1944, payable to order of Atlanta Biltmore, made and uttered to Atlanta Biltmore, Atlanta, Georgia, in the amount of $10.00.

Specification 7: Same form as Specification 1, but alleging check drawn on same bank, dated 21 August 1944, payable to order of Atlanta Biltmore, made and uttered to Atlanta Biltmore, Atlanta, Georgia, in the amount of $10.00.

Specification 8: Same form as Specification 1, but alleging check drawn on same bank, dated 22 August 1944, payable to order of Atlanta Biltmore, made and uttered to Atlanta Biltmore, Atlanta, Georgia, in the amount of $35.00.

Specification 9: Same form as Specification 1, but alleging check drawn on National Bank of Fort Sam Houston, San Antonio, Texas, dated 21 September 1944, payable to order of Cash, made and uttered to Daniel Field Officers' Mess, Daniel Field, Georgia, in the amount of $15.00.

Specification 10: Same form as Specification 1, but alleging check drawn on National Bank of Fort Sam Houston, San Antonio, Texas, dated 24 September 1944, payable to order of Cash, made and uttered to Daniel Field Officers' Mess, Daniel Field, Georgia, in the amount of $10.00.

Specification 11: Same form as Specification 1, but alleging check drawn on National Bank of Fort Sam Houston, San Antonio, Texas, dated 24 September 1944, payable to order of Cash, made and uttered to Daniel Field Officers' Mess, Daniel Field, Georgia, in the amount of $20.00.

Specification 12: (Finding of not guilty).

Specification 13: (Finding of not guilty).

He pleaded not guilty to all Charges and Specifications and was found guilty of the Charge and Additional Charges, guilty of the Specifications of the Charge and of Additional Charge I and of Specifications 1, 2, 10 and 11 of Additional Charge II, guilty of Specifications 3, 4, 5, 6, 7, 8,

and 9 of Additional Charge II except the words "and utter", substituting the word "payable", of the excepted word, not guilty, of the substituted word, guilty, and not guilty of Specifications 12 and 13 of Additional Charge II. He was sentenced to dismissal, total forfeitures, and confinement at hard labor for two years at such place as the reviewing authority might direct. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution established the following state of facts.

Specifications 1 and 2, the Charge.

Morning reports showed the accused as absent without leave from his organization and station at Daniel Field, Georgia, from 1 August 1944 (R. 8; Ex. 1) until his return to military control as a patient at Station Hospital, Fort Snelling, Minnesota, 8 August 1944 (R. 10, 11; Ex. 3). Departing from Fort Snelling 11 August 1944 (R. 10, 11; Ex. 3), he returned to duty at Daniel Field, Georgia, on 22 August 1944, from a status of absent without leave (R. 11; Ex. 4).

Testimony of his commanding officer (R. 7) showed that the accused was on leave from 16 July through 31 July, 1944. He requested an extension, which was denied (R. 14), and he was notified by telegram to return to his station (R. 10, 14, 17, 23, 124; Ex. 2). He did not return until 22 August (Ex. 4, R. 18). His commanding officer received notice by wire that accused was in the hospital at Fort Snelling on 8 August, and later verified that he was there under military control from 8 August to 11 August (R. 16-17). On 23 August, accused was interviewed by his commanding officer and stated that he had been delayed by sickness en route. Asked why he had not so notified his commanding officer, he stated that he "must have been AWOL" (R. 18-19, 20, 21). Accused was placed in arrest, and had no duty assignments after 22 August 1944 (R. 21). He made a signed and sworn statement on 6 September 1944, in which he attributed his delayed return to sickness and to inability to obtain more rapid transportation (R. 29; Ex. 9).

Specification, Additional Charge I.

Morning report of accused's organization showed him as absent without leave 26 October 1944 from fifteen days emergency leave and fifteen days extension (R. 11; Ex. 5). Testimony of his commanding officer showed that he was due to return to his station on 26 October 1944 from emergency leave (R. 19) which had been twice extended, for five days by telegram on 15 October (R. 25; Ex. 6) and for ten additional days by later wire (R. 25; Ex. 7). Request for further extension was denied and accused was ordered by wire 27 October to return immediately (R. 26; Ex. 8). He had no authority to be absent after 26 October 1944 (R. 19; R. 11, 12, 13), but did not return until about 2 November (R. 19).

Specifications 1 and 2, Additional Charge II.

A check dated 8 May 1944 for $30 (R. 53; Ex. 11) and a check dated 31 May 1944, for $200 (R. 53; Ex. 12), both drawn on the American National Bank of Kalamazoo, Michigan and payable to the order of Mel Zornes, were signed by the accused (Qualified banker's opinion, by deposition, R. 69; Ex. 24, Interrogatories 105-110). Both checks were made and signed by accused in the presence of the payee, Mel Zornes, Chief of Police and tavern owner of Moses Lake, Washington, on the dates they bear respectively, and given by accused to Zornes for cash. The accused received from Zornes United States currency in the face amounts of $30 and $200 respectively. Both were dishonored and returned through banking channels. Accused later told Zornes that his father had died and that he was up against it, but would take up the checks, and finally paid Zornes $35 by money order and sent him a series of promissory notes maturing serially at periods from 30 to 180 days from 3 January 1944, five for $33.47 and one for $33.50 (Deposition of Mel Zornes, R. 53; Ex. 23). On 8 May 1944 and on 15 May 1944 when the $30 check (Ex. 11) was presented for payment, accused had a bank balance to his credit at the drawee bank of $14.11. On 31 May that balance was $13.11, and on 30 June, when the $200 check (Ex. 12) was presented, it was 54 cents. Accordingly, both checks were dishonored (Bank statement, R. 69; Ex. 10. Banker's deposition, R. 69; Ex. 24). About 4 December 1944, accused stated to the Base Legal Officer at a conference with the Executive Officer that he would try to work out a settlement with Mr. Zornes (R. 74).

Specifications 3, 4, 5, 6, 7, 8, Additional Charge II.

The auditor of the Atlanta Biltmore Hotel, Atlanta, Georgia, testified from the records of the hotel, in his custody (R. 53). From 17 August 1944 to 22 August 1944, the accused was a registered guest there (R. 60). During that period the hotel, through its cashiers then on duty, received six checks bearing the purported signature of the accused, all drawn on the American National Bank, Kalamazoo, Michigan, and all payable to the order of the hotel. One was for $15, dated 18 August (R. 70; Ex. 13); one for $15, dated 19 August (R. 70; Ex. 14); another for $15, dated 19 August (R. 70; Ex. 15); one for $10, dated 20 August (R. 70; Ex. 16); one for $10, dated 21 August (R. 70; Ex. 17) and one for $35, dated 22 August (R. 70; Ex. 18). The fact that the books were in balance through the period in question indicated that the hotel gave money for the checks (R. 60). They were dishonored and returned, marked "Insufficient Funds" (R. 57, 58). A check for $100 was received by the hotel on 2 October to take up these items, and it was likewise dishonored. Finally the checks were taken up by payment on 4 December 1944 (R. 64). The signatures on the checks were recognized by an officer of the drawee bank as those of the accused. The checks were presented to the drawee bank for payment, but payment was refused for want of sufficient funds. On the dates they bear and when they were presented, the balance to the credit of the accused in the drawee bank was 24¢ (R. 69; Ex. 24, R. 69;

Ex. 10). About 18 or 19 September 1944 the accused, after due warning, orally admitted to the Base Legal Officer that he had written the six checks in question, that he had received money or services for them, and that he was indebted to the payee in their total amount, for which he proposed to make restitution (R. 72). About 4 December 1944, accused gave the witness a money order payable to the Atlanta Biltmore Hotel for $100 to take up the checks (R. 75).

Specifications 9, 10, 11, Additional Charge II.

Three checks bearing the purported signature of the accused were received by the Officers' Mess, Daniel Field, Georgia, all payable to "Cash", all drawn on the National Bank of Fort Sam Houston, San Antonio, Texas. All were dishonored upon presentation in due course (R. 31-34). One was for $15, dated 21 September 1944 (R. 49; Ex. 19); one for $10, dated 24 September 1944 (R. 49; Ex. 20); and one for $20, also dated 24 September 1944 (R. 49; Ex. 21). The bartender cashed the $20 check and the $10 check for the accused, out of Officers' Mess funds in his custody for that purpose, on 24 September 1944 (R. 40). The accused made out these two checks in the bartender's presence (R. 41). The bartender could not recall cashing the $15 check, though he might have done so (R. 40). The signatures on all three checks were recognized by an officer of the drawee bank as those of the accused. The checks were dishonored upon presentation at the drawee bank for lack of sufficient funds to the credit of the accused. (Deposition, R. 51; Ex. 22). On 21 September 1944 the accused had a credit balance on the books of the drawee bank of $109.34. On 27 September 1944, when Exhibit 19 was presented, his balance was $6.32 (Ex. 22). On 24 September 1944, it was $69.34. On 29 September 1944, when Exhibit 20 and 21 were presented, it was $5.82 (Ex. 22). (Bank statement, R. 50; Ex. 25). At a conference with the Executive Officer and Legal Officer about 4 December 1944, the accused redeemed all three checks with cash from his pocket, stating that he desired to make restitution (R. 74). Evidence above summarized under Specifications 1 and 2 and Specifications 3 through 8 of Additional Charge II shows that the accused had outstanding $230 in two checks to Mel Zornes and $100 in checks to the Atlanta Biltmore Hotel, all in default at the dates of the three checks here considered.

4. The defense introduced evidence substantially to the following effect.

Lieutenant Diehl, acting Club Officer, received $49 from the accused about 4 December 1944, of which $45 paid and redeemed the three checks, Exhibits 19, 20 and 21, to the Officers' Mess (R. 80). Accused identified the three checks as his checks (R. 81).

William B. Palmer (R. 106) was Acting First Sergeant of the Base Guard Section at Galena Airport, Spokane Air Technical Service Command, Spokane, Washington, under accused's command, on 31 May 1944 (R. 108).

Accused was at the airport all that day and drove the witness home at five o'clock in the afternoon. Moses Lake is about 150 miles from Spokane (R. 109). In late July, 1944, the witness agreed to buy a car from the accused and to send $125 for deposit to the credit of the accused in the accused's bank, the American National Bank of South Dakota, at Aberdeen, South Dakota, on the last day of July (R. 107, 111). The witness did not send the money because of illness in his family which caused unforeseen expense and resulted in his dependency discharge. Witness wrote a letter of explanation to the accused about August 5th, addressed to him at Daniel Field, Georgia (R. 108).

The accused sent telegrams to the Commanding Officer, Daniel Field, Georgia, as follows: 26 July 1944, requesting 5 days extension of leave to complete sale of his car and negotiate some refinancing (R. 83; Ex. A); 8 August 1944, advising that he was taken sick en route and was then hospitalized at Fort Snelling (R. 82; Ex. B); 4 October 1944, requesting 5 days extension of leave to attend to estate matters (R. 84; Ex. C); 16 October 1944, requesting 10 days extension of leave to liquidate assets and cover obligations (R. 84; Ex. D); 26 October 1944, requesting 3 days traveling time due to delay in locating his family (R. 85; Ex. E); 31 October 1944, stating that he was delayed at Fort Thomas, Kentucky, for treatment of an infected eye (R. 85; Ex. F).

Harold J. Stout, Pharmacist, Aberdeen, South Dakota, filled a prescription by Dr. Schuchardt for the accused for 50 7.7 grain Sulfathiazole tablets on July 20, 1944 (R. 88; Deposition Ex. G).

Accused's wife testified that accused was ill at home in Spokane, Washington, from 23 July to 30 July, 1944, during which time he vomited frequently and took sulfa pills. He went on one little trip to Grand Coulee Dam with his family and was sick on the trip. Witness saw him again on 1 October 1944, when she brought his father's body to Aberdeen, South Dakota. Accused then had a bad cold and was expelling blood into his handkerchief when he blew his nose (R. 89; Ex. H).

Captain LaLonde, Priorities Officer, Spokane Air Technical Service Command, advised accused on 29 July 1944 that accused was not qualified for air transportation priority. Accused sought such transportation pursuant to a wire from his commanding officer directing him to report back immediately (Deposition, R. 89; Ex. I). A Class 4 priority certificate was issued to him 29 July 1944 for transportation by air from Spokane, Washington, to Daniel Field, Georgia (Deposition, R. 89; Ex. J).

Accused complained of sickness, appeared to be nauseated, and could not eat, when at the home of a friend in Aberdeen, South Dakota for dinner one day in August, 1944 (Deposition, R. 89; Ex. K). He came to Fort Snelling Hospital in July or August 1944, said that he did not feel well, and looked like he was sick (Deposition R. 90; Ex. L).

He appeared at an Army hospital at Fort Thomas, Kentucky, at about 0900, 30 October 1944, and was advised for about ten minutes by an ophthalmologist concerning treatment for a sty of the eyelid (R. 90; Ex. M).

His train into Minneapolis on 28 October 1944 was late and missed connection with the outgoing train, which delayed him from 8:00 a.m. to 4:00 p.m. (Stipulation, R. 92; Ex. N).

Dr. I. L. Schuchardt, Aberdeen, South Dakota, attended the accused on 20 July 1944, diagnosed his illness as acute gonorrhea, and prescribed one gram sulfathiazole after each meal and at bedtime. This drug may and frequently does produce in sensitive persons vomiting and other disturbances. No blood test was taken (Deposition, R. 92; Ex. O; Stipulation, R. 91). The clinical record, Station Hospital, Fort Snelling, Minnesota, shows the accused as having been admitted from leave 8 August 1944 at 6:00 p.m., diagnosed as "Old" Gonorrhea (sic), acute, "Line of Duty, No," given penicillin, improved, and reverted to leave 11 August 1944. History was given of urethral discharge beginning 19 July 1944, 10 to 12 days after "contact with friend", followed by patient taking eight tablets of sulfathiazole a day for seven days, ceasing this medication for five days, then taking the same dosage for three days.

Certified copy of accused's Army Air Forces Officers' Qualification Record, WD AGO Form 66-2, showing, with various personal data, five efficiency ratings of "Excellent," four "Very Satisfactory" and three "Unknown". His "Excellent" ratings were as Provost Marshal. He had been awarded the Good Conduct Medal and had qualified as Expert with various weapons. Upon showing 1 3/4 years civilian occupation as "Police and Court Reporter" for a newspaper, obtaining news from police stations and court rooms, he was classified as "01.372, Court Reporter", but other occupational data resulted in additional classifications as Editor, Reporter and Special Investigator (R. 93; Ex. Q). His Honorable Discharge as an enlisted man, dated 19 January 1943, to accept his commission, showed honest and faithful service for 9 months 12 days, character and efficiency excellent (R. 124; Ex. R).

Accused rendered very satisfactory service on Reports of Survey for ten days in July 1944, for which the witness, Captain Cavanaugh, Air Corps, would have to rate him at least excellent (R. 94).

The accused made an unsworn statement (R. 117-121). The memory of the witnesses was unintentionally at fault, whereas his own was better. He was personally acquainted with Mel Zornes, who operated a beer tavern and gambling games at Moses Lake, Washington. Accused last saw Zornes in the forepart of May 1944. He could have given him a check for $30 as an IOU for chips in a gambling game, but did not, on 31 May 1944, give him a check for $200 (R. 118). Accused reported on time when transferred from Washington to Georgia in May. Informed that he

was disqualified for overseas duty, he expected no orders, and left on official leave on 15 July for Spokane (R. 118). He reported to Dr. Schuchardt's office at Aberdeen, South Dakota, on 20 July, and received treatment. He negotiated the sale of his car to Palmer. Palmer's memory failed as to the bank where Palmer was expected to make payment. Palmer knew that Aberdeen, South Dakota was accused's home. Accused was ill at home. He was refused an extension of leave. Failing to obtain air transportation back to his station, and suffering from his illness, he went to Fort Snelling for hospitalization. He wired his commanding officer on 8 August, advising of his illness. Having received no reply on 11 August, when he was discharged from the hospital, he assumed that his explanation was accepted and that the "continuance" was approved. The hospital discharged him "to leave". He did not check with Daniel Field on his status on the morning report, and assumed that he was carried as sick. His stay in Atlanta, Georgia, was on the assumption that his sick time did not count against his leave and that he was due back at Daniel Field on 23 August. He returned on 22 August, and was arrested and restricted to the post. Colonel Masters asked why he did not let them know if he was sick. Accused referred to his wire of 8 August. There was some discussion of the time of his return. To Colonel Masters' suggestion that he was AWOL, accused replied: "If you put it that way, I guess I might have been." While restricted to the post, accused performed the duty from 23 August to 3 September that his witness, Captain Cavanaugh, testified was in July. From 3 September to 26 September, accused was in the hospital at Daniel Field for nasal pharyngitis. He then received emergency leave by reason of his father's death, and went to Aberdeen, South Dakota for his father's burial and to look after his estate. Accused was low in funds by reason of using his pay for the funeral expenses, anticipating early collection of certain insurance (R. 119). His return to his station was delayed by estate affairs, lack of cash, a missed train connection, and a stop at Fort Thomas, Kentucky, for treatment of an inflamed eye. Upon return to Daniel Field, he was further restricted, which he regarded as a form of punishment. From 15 July to 3 November he was either sick or traveling. His chief defense is that he was ignorant of the facts. In five trips between Spokane, Washington and Augusta, Georgia, with stops at Kalamazoo, Michigan, and San Antonio, Texas, traveling some twenty thousand miles, he lost contact (R. 120). He cites his previous excellent record and Good Conduct Medal (R. 121).

5. The evidence of record amply sustains the findings of guilty of the Charge, of Additional Charge I, and of the three Specifications of absence without leave from the accused's organization and station at Daniel Field, Georgia, from 1 August 1944 to 8 August 1944, from 11 August 1944 to 22 August 1944, and from 26 October 1944 to 2 November 1944. Also, it fully sustains the findings of guilty of Specifications 1, 2, 10 and 11 of Additional Charge II, the fraudulent making and utterance of checks for $30, $200, $10 and $20, all as alleged, for value received, against an insufficient bank account, with full

knowledge and intent that the account was and would be insufficient for payment. This sustains the findings of guilty of Additional Charge II, violation of the 95th Article of War, under the circumstances of this case.

The evidence also sustained the allegations of Specifications 3 through 9, inclusive, of Additional Charge II, alleging that the accused fraudulently did make and utter seven additional bad checks, but the court, in a zealous exuberance of legal confusion, rendered nugatory its findings of guilty of these specifications by excepting the essential words, "and utter", and finding the accused not guilty thereof. This finding acquitted him of the utterance, in the face of undisputed evidence that he acknowledged indebtedness on each of the checks involved and ultimately redeemed them, which would readily support the inference that he uttered them, there being proof that he made them and that they were received by the payees for value. Circumstantial evidence is fully competent, not a secondary or inferior species of evidence, and may be more or less convincing than direct evidence according to the probative weight of the circumstances involved. (MCM 1928, par. 112b, page 111). Its value as evidence is limited only by the proposition that, like any other kind of evidence, it must have sufficient probative force logically to impel the inference of guilt, to the exclusion of other fair and reasonable hypotheses, in order to convince beyond reasonable doubt (MCM 1928, par. 78a, page 63). The court's view that utterance could not be proved by circumstantial evidence (R. 105-106) was clearly erroneous, but as clearly beneficial, not prejudicial, to the accused.

The effect of the exception and substitution was to find the accused guilty only of making the checks in question, payable to the specified payees. The introduction of the word "payable", by substitution, added nothing to the Specification. It became merely a part of the description of the check, and as such was idle surplusage in Specifications 3 through 8 and contradictory of the quoted face of the check in Specification 9. The language "in payment of value received," remaining in the specifications, became meaningless, as "payment" obviously could not be accomplished by the mere making of a check, without utterance. It is elementary that the mere making of one's own check, without putting it to use in any way so as to affect the rights or interests of other persons, constitutes no offense. (CM 276673, Hoffman, _____ BR _____, 30 March 1945; CM 243091, McCarthy, 27 BR 273, 282). The gravamen of the offense lies in the utterance (Footnote, 35 CJS 657). A negotiable instrument has no legal significance until delivery (People v. Cassou, Cal. App., 148 Pac. 810). Accordingly, the findings of guilty of Specifications 3, 4, 5, 6, 7, 8 and 9 of Additional Charge II fail to adjudicate the commission of any offense, and fail to support the Charge.

The elements of fraudulent intent and dishonorable evasion sufficiently appear in the evidence to justify laying the offenses under the 95th

Article of War, as to the checks to Zornes and to the Officers' Mess. In each instance the evidence is that the accused passed the checks for money, well knowing that they would be dishonored upon presentation, and made restitution only when put under pressure and, inferentially, in the hope of avoiding unpleasant consequences. His evasive, unsworn denial that he gave Mel Zornes a check for $200 on 31 May 1944 was particularly unbecoming.

The absences without leave established in the case were all failures to return from authorized leaves as extended and were all abuses of patient and considerate indulgences extended the accused by his commanding officer, to accommodate him in adjusting his personal affairs and in mitigating his misfortunes. These abuses he has sought to excuse by a patent exaggeration and prolongation of such disability as he suffered from illness attributable to his own misconduct, which, under the circumstances, constitutes neither excuse nor substantial extenuation (MCM 1928, par. 132, page 146).

Various objections and contentions raised by the defense have been noted and considered, but are not regarded as requiring further comment here.

6. The accused officer is 28 years of age, married, with one minor child. He is a native of Minnesota and resident of Aberdeen, South Dakota. He had two years of college education, of which one year was at the University of Minnesota and the other at Northern South Dakota State Teachers College, ending in 1936. In civilian life he was employed from March 1936 to May 1937 as a news reporter on the Chicago Herald-Examiner, from May 1937 to December 1938 as a Special Investigator in the Office of the Attorney General of South Dakota, from December 1938 to July 1940 as night editor of the American News, Aberdeen, South Dakota, and from July 1940 to April 1942 as reporter of police and court news for the Kalamazoo Gazette, Kalamazoo, Michigan. After enlisted service from April 1942 to 19 January 1943, he was appointed second lieutenant, Army of the United States, through Officer Candidate School at Miami Beach, Florida, 20 January 1943, and ordered to active duty in the Air Corps. He was promoted to the grade of first lieutenant 13 May 1944. His resignation for the good of the service, tendered 16 September 1944 with the approval of his immediate command, received adverse recommendation upon the retraction of that approval in the light of additional information and was disapproved 1 December 1944. He has served in commissioned status as Provost Marshal, Assistant Provost Marshal, Base Guard Officer, and training officer, at various Army Air Fields, with ratings of Excellent and Very Satisfactory.

7. The court was legally constituted and had jurisdiction of the person and subject matter. No errors injuriously affecting the substantial rights of accused were committed. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of the Charge and Additional Charges, the Specifications of the

Charge and Additional Charge I, and Specifications 1, 2, 10 and 11 of Additional Charge II, legally insufficient to support the findings of guilty of Specifications 3, 4, 5, 6, 7, 8 and 9 of Additional Charge II, and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized for violation of Article of War 61 and is mandatory for violation of Article of War 95.

(Sick in quarters), Judge Advocate.

Herbert B. Fiderica, Judge Advocate.

[illegible], Judge Advocate.

SPJGQ - CM 277804 1st Ind

Hq ASF, JAGO, Washington 25, D. C.

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Earl C. Wingard (0-573797), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of three Specifications of absence without leave, for seven, eleven, and seven days respectively, in violation of Article of War 61 (the Charge and Additional Charge I and Specifications), and of four Specifications of making and uttering worthless checks for value (Specifications 1, 2, 10 and 11, Additional Charge II) and seven Specifications of making worthless checks for value (Specifications 3, 4, 5, 6, 7, 8 and 9, Additional Charge II), in violation of Article of War 95 (Additional Charge II). He was sentenced to dismissal, total forfeitures, and confinement at hard labor for two years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Charge and Additional Charges, of the Specifications of the Charge and Additional Charge I and Specifications 1, 2, 10 and 11 of Additional Charge II, legally insufficient to support the findings of guilty of Specifications 3, 4, 5, 6, 7, 8 and 9 of Additional Charge II, and legally sufficient to support the sentence and to warrant confirmation of the sentence. I concur in that opinion.

The accused officer was refused an extension to an authorized leave expiring 31 July 1944, and ordered by wire 27 July 1944 to return to his station at Daniel Field, Georgia, to comply with orders. He did not return until 22 August 1944, but from 8 August to 11 August was under military control at an Army hospital at Fort Snelling, Minnesota, suffering from acute gonorrhea which, together with adverse reaction from treatment therefor, had rendered him ill for some time prior to his admission to the hospital. Given an emergency leave and two extensions expiring 26 October 1944, he was refused a third extension and ordered by wire 27 October 1944 to return immediately to his station. He did not return until 2 November 1944. He was delayed for eight hours by missing a train connection on 28 October 1944 and

stopped at Fort Thomas, Kentucky, for a few minutes on 20 October 1944 for treatment for inflammation of the eye due to a sty on the eyelid.

He made and uttered worthless checks for cash to a tavern owner at Moses Lake, Washington, on 8 May 1944 for $30 and on 31 May 1944 for $200; also to the Officers' Mess at Daniel Field, Georgia on 24 September 1944 for $20 and $10, for all of which his conviction is legally sustained. He was found guilty of making eight additional worthless checks totalling $115, but was acquitted of uttering them. His conviction for making these additional checks was not sustained by the Board of Review, by reason of error in the findings. The evidence was sufficient to prove that the accused both made and uttered all these checks. Ultimately, under strong persuasion, he made restitution in cash for all of the checks except the check for $200 payable to the tavern owner, and gave some cash and a series of promissory notes to redeem that item. All of the check transactions were consciously fraudulent. The whole course of conduct of the accused discloses an utter misconception of and disregard for the standards of an officer and a gentleman.

I recommend that the sentence be confirmed but that, by reason of restitution made and upon all the circumstances of the case, the forfeitures and confinement in excess of one year be remitted, and that the sentence as thus modified be carried into execution. I further recommend that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

Myron C. Cramer

2 Incls
1 - Record of trial
2 - Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Findings disapproved in part. Sentence confirmed but forfeitures remitted, and confinement in excess of one year remitted. GCMO 228, 13 June 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGH-CM 277892 9 APR 1945

UNITED STATES	ARMY AIR FORCES WESTERN TECHNICAL TRAINING COMMAND
v.	Trial by G.C.M., convened at Lowry Field, Denver, Colorado, 16 March 1945. Dismissal and total forfeitures.
Second Lieutenant HOWARD T. CARNOHAN (O-2071315), Air Corps.	

OPINION of the BOARD OF REVIEW
TAPPY, GAMBRELL and TREVETHAN, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 61st Article of War

Specification 1: In that 2d Lt. Howard T. Carnohan, Air Corps Unassigned, Attached Squadron T, 3705th Army Air Forces Base Unit (Technical School), did, without proper leave, absent himself from Flight Engineers School at Lowry Field, Colorado from about 15 February 1945 to 0200 5 March 1945.

Specification 2; In that 2d Lt. Howard T. Carnohan, * * *, did, without proper leave, absent himself from Flight Engineers School at Lowry Field, Colorado from about 27 January 1945 to about 13 February 1945.

He pleaded guilty to and was found guilty of the Charge and each Specification thereof. No evidence of any previous conviction was introduced. He was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The only evidence introduced by the prosecution consisted of a stipulation between the prosecution, defense counsel and accused to

the effect that accused made a pre-trial statement to the investigating officer, Lieutenant Colonel Hawley C. Kerr, following an explanation of his rights and that the statement was as follows:

"I came to Lowry Field on 31 December, 1944, on orders to attend Flight Engineers School.

"Because of illness during the week of 12 February, 1945, I went on sick call for several days during that week. On or about the 19th of February, I was advised to return to school. I had been excused from school on the 17th of February, but ordered to return to school on the 19th of February. However, I did not go back to school on that date or on any date since then. I did come out to the field several times during the period since 19 February, 1945, but did not attend Flight Engineers School.

"I did not return to school because I did not want to become a Flight Engineer. I worked hard for my commission as second lieutenant and for my pilot's wings and I do not want to be anything but a pilot.

"I became disgusted with the school and the way they were treating us. I did not feel that I was being treated in the manner to which an officer is entitled. Specifically I object to the student officers being marched to class and to mess.

"I was apprehended by the Military Police at about 0100 this morning (5 March, 1945), at the Shirley Savoy Hotel in Denver and returned to Lowry Field at about 0200 this morning." (R. 5-6).

4. The defense introduced no evidence and the accused, after having his rights fully explained, elected to remain silent.

5. The accused's plea of guilty together with his statement made to the investigating officer clearly establishes that accused was absent without leave from 27 January 1945 to 13 February 1945 and again from 15 February 1945 to 5 March 1945 as alleged. The findings of guilty of the Charge and its two Specifications are, accordingly, fully sustained by the record.

6. The War Department records show that accused is 24 years of age and single. Following his graduation from high school he enlisted in the Army 21 October 1940. He was enrolled as an aviation cadet in March 1943 and upon graduation from Army Air Forces Advanced Flying School, Ellington Field, Texas, 8 September 1944, he was appointed a second lieutenant, and ordered to active duty the same date.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the

substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 61.

Thomas N. Tarry, Judge Advocate

William H. Gambrell, Judge Advocate

Robert C. Trueblood, Judge Advocate

SPJGH-CM 277892 1st Ind

Hq ASF, JAGO, Washington 25, D. C.

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Howard T. Carnohan (0-2071315), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to and was found guilty of absence without leave on two separate occasions, from 27 January 1945 to 13 February 1945 and again from 15 February 1945 to 5 March 1945, in violation of Article of War 61. He was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I concur in that opinion. While accused was a student at the Flight Engineers School, Lowry Field, Colorado, he absented himself without leave for a period of 17 days, from 27 January 1945 to 13 February 1945 and for a period of 18 days, from 15 February 1945 to 5 March 1945. Information contained in a letter from accused's station dated 28 March 1945 discloses that the accused was paid his flying pay for the month of January in the sum of $78.75 when, as a matter of fact, he did not fly the required time during the month of January. On 26 March 1945 he restored these funds to the finance officer.

I recommend that the sentence be confirmed but that the forfeitures be remitted and that as thus modified the sentence be carried into execution.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should such recommendation meet with your approval.

Myron C. Cramer

2 Incls
1. Record of trial
2. Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but forfeitures remitted. GCMO 214, 13 June 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGK - CM 277893

3 APR 1945

UNITED STATES v. Second Lieutenant JOHN H. LAWSON (0-785836), Air Corps.	ARMY AIR FORCES WESTERN TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at Lowry Field, Denver, Colorado, 16 March 1945. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
LYON, HEPBURN and MOYSE, Judge Advocates.

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1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 61st Article of War.

Specification 1: In that 2d Lt. John Lawson, Air Corps Unassigned, Attached Squadron T, 3705th Army Air Forces Base Unit (Technical School), did, without proper leave, absent himself from Flight Engineers School at Lowry Field, Colorado from about 0600 17 February 1945 to 0200 5 March 1945.

Specification 2: In that 2d Lt. John Lawson, * * *, did, without proper leave, absent himself from Flight Engineers School at Lowry Field, Colorado from about 26 January 1945 to 13 February 1945.

He pleaded guilty to and was found guilty of the Charge and both of its specifications. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution.

The only evidence introduced by the prosecution in support of accused's pleas of guilty was a pre-trial statement made by accused to the investigating officer. As a preliminary to the introduction of this statement in evidence, it was stipulated that if the investigating officer were present at the trial, he would testify that accused made and signed the statement on 5 March 1945, after having been first warned and advised of his

rights under the 24th Article of War. The statement was introduced without objection and was, in pertinent part, as follows:

"My name is John H. Lawson, 2nd Lt. Air Corps, unassigned, attached Sq T, 3705 AAF Base Unit Lowry Field, Colo.

"I came to Lowry Field on 4 Jan '45 under orders to enter Flight Engineer School. After I had been in Flight Engineer School for several weeks I was dropped from said school as AFI, because I had been absent from school on account of illness.

"About 16 February I was told by Capt Straub that I was to reenter said school. I don't remember the exact date but I was to reenter school about 16th or 17th Feb '45.

"I did not reenter school at the time when I was told to, and have not reported to the school at any time since 16 Feb '45. During this period since 16 Feb '45, I have been at Denver, Colorado at all times, except 3 or 4 times that I came back to Lowry to get my mail or laundry.

"I don't like the Flight Engineering School, as I do not like the B-29, I do not want to be a Flight Engineer.

"I am a single engine pilot, having received my training at Williams Field, Arizona.

"The only reason that I can give for quitting school at FES was because I do not want to be a Flight Engineer.

"I was apprehended by Military Police at Shirley Savoy Hotel in Denver, at about 0100 oclock this morning (5 March 1945).

John H. Lawson" (R. 5, Ex. A).

4. For the defense.

Upon being advised of his right to testify under oath, to make an unsworn statement, or to remain silent, the accused elected to remain silent.

Defense counsel requested that the court take judicial notice of Army Air Forces Regulations 50-8, 31 December 1942, which it agreed to do.

5. While it is deemed the better practice for the prosecution to make out a prima facie case against an accused by the introduction of competent evidence notwithstanding pleas of guilty, it has been consistently held that a plea of guilty admits the facts set forth in the specification and is legally sufficient, standing alone, when the accused does not take a position during the trial that is inconsistent with such plea, to sustain a finding of guilty (CM 236359, Tindell, 22 B.R. 390; CM 226247, Leavitt, 16 B.R. 51; CM 237522, Dugan, 24 B.R. 31,34). Accused's pleas of guilty, taken in conjunction with his pre-trial statement, are sufficient in the instant case to support the findings of guilty. We have examined Army Air Forces Regulations 50-8, 31 December 1942, and find nothing therein of benefit to the accused.

6. War Department records show the accused to be 20-1/2 years of age and single. He completed the first nine grades of schooling. In February 1943 he entered military service. He served as an enlisted man and as an Air Cadet until he successfully completed his fighter pilot training on 8 September 1944, when he was commissioned second lieutenant, AUS.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of violation of Article of War 61.

, Judge Advocate.

, Judge Advocate.

, Judge Advocate.

SPJGK - CM 277893 1st Ind.
6 APR 1945

Hq ASF, JAGO, Washington 25, D. C.,

TO: The Secretary of War

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant John H. Lawson (0-785836), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. The record shows willful absence without leave for extended periods of time upon two occasions. I recommend that the sentence be confirmed but that the forfeitures be remitted and that as thus modified the sentence be carried into execution.

3. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

3 Incls
1. Record of trial
2. Drft ltr sig. S/W
3. Form Ex action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but forfeitures remitted. G,C.M.O. 191, 9 June 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGN
CM 277894

U N I T E D S T A T E S	)	ARMY AIR FORCES WESTERN TECHNICAL TRAINING COMMAND
v.	)	Trial by G.C.M., convened at Lowry Field, Denver, Colorado, 13 March 1945. Dismissal.
Second Lieutenant ROBERT DeWAYNE GAUVIN (0-784422), Air Corps.	)	

OPINION of the BOARD OF REVIEW
LIPSCOMB, O'CONNOR and MORGAN, Judge Advocates

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1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Robert DeWayne Gauvin, Air Corps Unassigned, Attached Squadron T, 3705th Army Air Forces Base Unit (Technical School), did, without proper leave, absent himself from his duties at Lowry Field, Denver, Colorado, from about 7 February, 1945, to about 19 February, 1945.

He pleaded guilty to, and was found guilty of, both the Charge and the Specification thereunder and was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The prosecution rested its case upon the pleas of guilty and introduced no evidence (R. 4).

4. Having been apprised of his rights relative to testifying or remaining silent, the accused took the stand on his own behalf. He had been called to active duty as a private on 22 February 1943, only six months after leaving school. Upon completing approximately a month and a half of basic training, he was admitted "to aviation school". On 4 August 1944 he received his aeronautical rating and his commission (R. 5).

His subsequent assignment as a student to the Flight Engineers School at Lowry Field, Colorado, was a bitter disappointment to him. In his own words,

> "I didn't know what I could accomplish from going to the school, I had spent approximately nineteen months to obtain my rating as a pilot and then after I obtained it I found it was no longer of much use to me, and to this school they sent me to, Flight Engineers School, a pilot's rating wouldn't be of much use, so I thought maybe when I got through with this it would be of no use and I thought maybe I would be sent to another school.
>
> * * *
>
> "I just felt I wasn't getting any place, just going to school all the time and not receiving any benefits, just being sent to another school, I just felt like I wasn't getting any place" (R. 6).

Most of his absence from 7 to 19 February 1945 was spent in his barracks "sleeping". Upon his return to duty he was permitted to resume his studies. At the time of his trial he was only twenty years of age. He had never previously been either court-martialed or punished under Article of War 104 (R. 6).

5. The Specification alleges that the accused "did, without proper leave, absent himself from his duties * * * from about 7 February, 1945, to about 19 February, 1945". This offense was laid under Article of War 61.

By his pleas of guilty the accused admitted all of the facts set forth in the Specification: Dig. Op. JAG, 1912-1940, sec. 378 (3). In his subsequent testimony on his own behalf he conceded that he had been absent for twelve days. His explanation contained nothing of a mitigating or extenuating character. The complaint that he "wasn't getting any place", while expressing an extremely common grievance in the Army, can never justify the avoidance of duty. The Specification is sustained by the record beyond a reasonable doubt.

6. The accused, who is single, is about 21 years of age. After being graduated from high school, he was employed as a machinist and bench hand from June to November of 1942. He enlisted as a private in the Enlisted Reserve Corps on 11 December 1942 and was called to active duty on 22 February 1943. On 4 August 1944 he was commissioned as a second lieutenant.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 61.

Abner E. Lipscomb, Judge Advocate.

Robert J. Glamon, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 277894 1st Ind
Hq ASF, JAGO, Washington, 25, D. C.

TO: Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Robert DeWayne Gauvin (0-784422), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to, and was found guilty of, absenting himself from his duties without leave for a period of twelve days, in violation of Article of War 61. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof.

The accused, who was attached as a student to the Flight Engineers School at Lowry Field, Colorado, absented himself without leave from his classes for twelve days. The explanation offered by him for his conduct was that he had been attending various Army schools ever since his call to active duty as a private on 22 February 1943 and that he "wasn't getting any place". When subsequent to his trial he was interviewed by the reviewing authority, he, according to the staff judge advocate's review, "displayed no remorse for his act" and stated in essence "that he realized that he was committing a military wrong but that he neither desired nor intended to attend Flight Engineer School and would rather be a private in the Army than attend the school". By thus expressing his total lack of repentance for the serious breach of military discipline which he had committed the accused has demonstrated that he can be of no further service to the Army as an officer.

I accordingly recommend that the sentence of dismissal be confirmed and ordered executed.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

Myron C. Cramer

2 Incls
Incl 1 - Record of trial
Incl 2 - Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed. G.C.M.O. 218 , 13 June 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGQ - CM 277895

UNITED STATES v. Second Lieutenant WILLIAM L. GRICE (O-781556), Air Corps.	ARMY AIR FORCES WESTERN TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at Lowry Field, Colorado, 16 March 1945. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
ANDREWS, FREDERICK and BIERER, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that 2nd Lieutenant William Grice, Air Corps Unassigned, Attached Squadron T, 3705th Army Air Forces Base Unit (Technical School), did, without proper leave, absent himself from Flight Engineers' School at Lowry Field, Colorado, from about 6 February 1945 to about 8 March 1945.

He pleaded guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The only evidence for the prosecution consisted of a stipulation between accused, his counsel and the prosecution, accepted by the court, that if the investigating officer were present he would testify that he interviewed accused and "advised him of his rights under the Constitution and under the 24th Article of War", and that accused made and signed the statement marked Prosecution Exhibit "A". The statement was introduced in evidence without objection from the defense, and was read to the court (R. 5). The material portions of the statement are as follows:

"I came to Lowry Field during the latter part of January 1945 under orders assigning me to Flight Engineer School as a student officer. Pursuant to said orders I entered said school and continued in said school until 6 February 1945, since which time, I have not returned at any time to the said school.

"I do not have any very good excuse for my failure to attend this school during the period from 6 February to 8 March 1945. I haven't been feeling well, although I have not been so ill that I could not have attended school. Another reason for my failure to attend school is that I do not feel that I am qualified to be in this school. My formal education ended with my second year of high school. It is true that during the time that I was in Flight Engineer School, here, I did not fail any courses.

"With reference to my not feeling well, I have for some time been under observation for the possibilities of tuberculosis. However, I have not been diagnosed as having it.

"I was commissioned on 27 June 1944 and at the same (sic) I was awarded my pilot's wings. I have been trained as a two engine pilot. I received this training at Victorville, California" (Pros. Ex. A).

Accused further admitted that he had freely and voluntarily made the statement and that the investigating officer "advised me of my rights under the 24th Article of War and warned me that such statements as I should freely and voluntarily make to him might be used against me in a courtmartial (sic) trial for the said offenses" (Pros. Ex.A).

4. The accused, after having his rights as a witness explained to him, elected to remain silent (R. 5-6).

Defense counsel introduced and read in evidence Army Air Forces Regulation No. 50-8, 31 December 1942, which provides as follows:

"1. Upon graduation from a prescribed course of instruction at an Army Air Forces special service school or at a civil school designated as a proper institution for training military personnel, AAF personnel will not be permitted to undergo a course of instruction in another specialized field until a minimum of one year has elapsed.

2. This Regulation shall not prevent the following:

a. Personnel from receiving further training in the same specialty within the year. * * *

b. Graduates of a heavier-than-air course of flying at an Army Air Forces advanced flying school, leading to the rating of pilot, who prove themselves unqualified to pilot equipment of unit to which assigned, from receiving additional training in another specialty prior to completion of one year's service."

Two other classes of personnel are excepted from the prohibition of the regulation (R. 6; Def. Ex. 1). Accused clearly does not fall within either class.

5. In addition to pleading guilty to the offense charged, accused admits by his voluntary signed statement his assignment to and entrance in the Flight Engineer School, and his absence from the school since 6 February 1945. His excuses of "not feeling well" and not feeling that he was "qualified" to be in the school are clearly no justification for his absence without leave for thirty days from the school. Indeed, accused himself admits by his statement his lack of "any very good excuse" for his failure to attend the school. The findings of guilty are fully supported by the record.

The purpose of the defense in introducing the Army Air Forces Regulation in evidence was apparently to show that such regulation prohibited accused's assignment to the school from which he absented himself without leave. For aught that appears, accused came within one of more of the classes of personnel to whom the regulation did not by its terms apply. However, assuming that the evidence shows that accused was ordered to attend the school in violation of the regulation, it is too clear for argument that such fact would not authorize him to absent himself from the school and would not constitute a defense to the offense charged.

6. War Department records show that accused is 24 years of age and is single. He completed one year of high school. He worked as a stock clerk and salesman for a wholesale candy and fountain supply firm in Decatur, Illinois, for three years, and as a stock clerk for a china and silver retail store in South Bend, Indiana, for a brief period. He served in an enlisted status from November 1941 until June 1944, during which period he attended a mechanic's school and a gunnery school, and received air crew training and pilot training as an aviation cadet. He was commissioned a second lieutenant in the Army of the United States on 27 June 1944 upon graduation from the 3033d AAF Base Unit (Pilot School, Basic) at Stockton Field, California. Accused states that he has been trained as a two-engine pilot at Victorville, California.

7. The Court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 61.

Fletcher R. Andrews, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

[illegible], Judge Advocate.

SPJGQ-CM 277895 1st Ind

Hq ASF, JAGO, Washington 25, D. C.

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant William L. Grice (0-781556), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to and was found guilty of absence without leave for 30 days in violation of Article of War 61. He was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence will be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I concur in that opinion.

On February 6, 1945, the accused absented himself without leave from Flight Engineers School at Lowry Field, Colorado, where he had been assigned as a student officer. He remained absent without leave from the school until March 8, 1945. In a signed statement which was introduced in evidence the accused admitted that he did not have "any very good excuse" for failing to attend the school during the 30-day period, although he had not been "feeling well" and did not feel himself "qualified" to attend the school since his formal education had ended with his second year of high school. The defense introduced in evidence an Army Air Forces Regulation in an apparent attempt to show that the assignment of the accused to the school had been in violation of the terms of the regulation, which prohibited assignments of Army Air Forces personnel to certain courses of instruction within a year of graduation from certain other schools. The evidence does not show a violation of the regulation, and even if a violation were shown, such fact would not have authorized the accused to absent himself from the school without official leave.

Attached to the record of trial is a communication dated May 2, 1945, from the Commanding Officer, Lowry Field, Denver, Colorado, stating that on April 28, 1945, the accused broke his arrest and left the post, apparently remaining absent for a few hours.

I am of the opinion that the accused's conduct reveals a complete lack of the sense of responsibility required of a commissioned officer. I recommend that the sentence be confirmed but that the forfeitures be remitted, and that the sentence as thus modified be carried into execution.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

Myron C. Cramer.

2 Incls
Record of trial
Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but forfeitures remitted.
G.C.M.O. 234, 19 June 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGH-CM 277921

12 APR 1945

UNITED STATES	THE INFANTRY SCHOOL
v.	Trial by G.C.M., convened at Fort Benning, Georgia, 23 March 1945. Dishonorable discharge and confinement for ten (10) years. Federal Reformatory, Chillicothe, Ohio.
Private WALLACE S. BRISCOE (6934919), 19th Company, 1st Student Training Regiment.	

HOLDING by the BOARD OF REVIEW
TAPPY, GAMBRELL and TREVETHAN, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 58th Article of War

Specification: In that Private Wallace S. Briscoe, 19th Company, 1st Student Training Regiment, The Infantry School, did, at Fort Benning, Georgia, on or about 7 February 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at or near Fairfield, Illinois, on or about 16 February 1945 and was returned to military control at Camp Breckinridge, Kentucky, on or about 22 February 1945.

CHARGE II: Violation of the 93d Article of War

Specification 1: In that Private Wallace S. Briscoe, 19th Company, 1st Student Training Regiment, The Infantry School, did, at Fairfield, Illinois, on or about 15 February 1945, feloniously take, steal, and carry away a Chevrolet automobile, value of more than $50.00, the property of Mr. Sam Hooper, Fairfield, Illinois.

Specification 2: In that Private Wallace S. Briscoe, 19th Company, 1st Student Training Regiment, The Infantry School, did, at Wayne City, Illinois, on or about 15 February 1945, feloniously take, steal, and carry away a Packard automobile, value of more than $50.00, the property of Mr. Frank Harold Collins, Wayne City, Illinois.

CHARGE III: Violation of the 96th Article of War

Specification: In that Private Wallace S. Briscoe, 19th Company, 1st Student Training Regiment, The Infantry School, having been placed in administrative restriction to the limits of the Company area, 19th Company, 1st Student Training Regiment, The Infantry School, did, at Fort Benning, Georgia, on or about 6 February 1945, break said restriction by going beyond the limits thereof.

ADDITIONAL CHARGE I: Violation of the 61st Article of War

Specification: In that Private Wallace S. Briscoe, 19th Company, 1st Student Training Regiment, The Infantry School, did, without proper leave, absent himself from his station at Fort Benning, Georgia, from about 4 March 1945 to about 6 March 1945.

ADDITIONAL CHARGE II: Violation of the 69th Article of War

Specification: In that Private Wallace S. Briscoe, 19th Company, 1st Student Training Regiment, The Infantry School, having been duly placed in confinement in the Detention Barracks, Fort Benning, Georgia, on or about 28 February 1945, did, at Fort Benning, Georgia, on or about 4 March 1945 escape from said confinement before he was set at liberty by proper authority.

He pleaded not guilty to and was found guilty of all Charges and Specifications. Evidence of two previous convictions was introduced, one by summary court-martial 30 August 1944, for AWOL from 22 August 1944 to 25 August 1944 for which he was sentenced to forfeit $10 of his pay and restricted to the limits of his post for 30 days, and the other by special court-martial 18 September 1944 for breach of restriction and AWOL from 5 September 1944 to 6 September 1944 for which he was sentenced to confinement at hard labor for 6 months and to forfeit $17 per month for a like period. For the instant offenses he was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. The reviewing authority approved the sentence, reduced the period of confinement to 10 years, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification, Charge III and its Specification, Additional Charge I and its Specification and Additional Charge II and its Specification and legally sufficient to support the sentence. Accordingly, no discussion of the evidence pertaining to these Charges and Specifications will be made in this holding. The only question requiring consideration here is whether the evidence is legally sufficient to support the findings of guilty of Specifications 1 and 2 of Charge II.

The evidence in support of Specification 1 of Charge II shows that Mr. Sam Hooper of Fairfield, Illinois, owned and possessed a Chevrolet automobile, 1937 model 2-door sedan, bearing 1944 Illinois license number 606-024, factory number 21GB03-14472 and motor number 586994. At about 9 o'clock in the evening of 15 February 1945 Mr. Hooper parked this automobile just east of Varner's Restaurant on Route 15 in Fairfield, Illinois. He had not given accused or anyone else permission to use it. At about 9:15 o'clock of the same evening this car was missing from the place where it had been parked and Mr. Hooper reported the matter to the city police of Fairfield. He next saw his car about 9 o'clock on the morning of 16 February 1945. It was parked on highway number 15 about five miles west of Fairfield, Illinois. The car was in good running condition prior to its disappearance, but when he recovered it the following day, the starter mechanism was broken, the trunk was bent, and the trailer hitch and rear bumper were bent. He purchased this automobile about four years previously for $280, and it was stipulated that the value of the car was in excess of $50.

One Carl Edward Earles met accused in Varner's Restaurant on the evening of 15 February 1945 and thereafter, at the invitation of accused, accompanied accused in Mr. Hooper's Chevrolet automobile in the direction of Wayne City, Illinois. After proceeding about five miles west of Fairfield, over and along highway number 15, the automobile stopped and they were unable to again get it started. Accused abandoned the car at this point on highway number 15 and Earles and accused caught a ride to Wayne City.

The evidence in support of Specification 2 of Charge II shows that Mr. Frank Harold Collins of Wayne City, Illinois, owned and possessed a green Packard automobile coupe bearing 1944 Illinois license number 627-623. On 15 February 1945 at about 8:30 o'clock in the evening he parked this car in front of his restaurant located on highway number 15 in Wayne City, Illinois. Neither the accused nor anyone else had been given permission to use this car. At about 11 o'clock of the same evening Mr. Collins missed his car, and thereafter on 16 February he found his car parked on South 10th Street about 50 feet south of highway number 15, in Fairfield, Illinois, with the ignition key missing, the foot accelerator bent down and out of gasoline. He purchased this car in 1943 for $130, and it was stipulated that the value of the car was in excess of $50.

After reaching Wayne City, Illinois, Earles and accused separated, the former going to a point about two blocks north of Mr. Collins' restaurant. While at this point he saw accused get in Mr. Collins' Packard coupe and drive toward him. Accused picked Earles up and they proceeded back to Fairfield, Illinois. It was then about 10 o'clock at night. They reached Fairfield about 10:45 and later about midnight of 15 February 1945 parked the Packard coupe on the street in Fairfield and abandoned it.

4. The foregoing evidence shows only that on 15 February 1945 accused wrongfully took and carried away an automobile belonging to a Mr. Hooper, of Fairfield, Illinois, and drove it a distance of about five miles in the direction of Wayne City, Illinois, where he abandoned it because of mechanical trouble and thereafter proceeded to Wayne City, where he wrongfully took another car belonging to a Mr. Collins and drove it back to Fairfield, Illinois, where he parked it on the street, apparently after the gasoline was consumed. There is no direct proof that accused intended permanently to deprive the respective owners of their property, but all the circumstances rather reflect an intent on his part to make wrongful use of the automobiles for pleasure drives of short duration and distance only and negative an intent permanently to deprive the owners thereof. The Board of Review is, therefore, of the opinion that one of the essential elements of larceny, to wit, an intent permanently to deprive the owner of the property taken is not shown by the proof, and that the evidence is legally sufficient to support only so much of the findings of guilty as involves the lesser included offense of wrongfully taking and carrying away the two automobiles described in Specifications 1 and 2 of Charge II without the consent of the respective owners thereof at the times and places therein respectively alleged, in violation of the 96th Article of War.

5. For the foregoing reasons the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge I and its Specification, Charge III and its Specification, Additional Charge I and its Specification, Additional Charge II and its Specification, only so much of the findings of guilty of Charge II and Specifications 1 and 2 thereof as involves findings of guilty of wrongfully taking and carrying away the automobiles described in these two Specifications, at the times and places therein alleged, respectively, without the consent of the respective owners thereof, all in violation of the 96th Article of War, and legally sufficient to support the sentence.

Thomas N. Jaffe, Judge Advocate

William H. Lambrecht, Judge Advocate

Robert E. Trueblood, Judge Advocate

SPJGH-CM 277921 1st Ind

Hq ASF, JAGO, Washington 25, D. C.

TO: The Commanding General, The Infantry School, Fort Benning, Georgia.

1. In the case of Private Wallace S. Briscoe (6934919), 19th Company, 1st Student Training Regiment, I concur in the foregoing holding by the Board of Review and for the reasons therein stated recommend that so much of the findings of guilty of Charge II and Specifications 1 and 2 thereof be vacated as involves findings of guilty of offenses other than wrongfully taking and carrying away the automobiles described in these two Specifications, at the times and places therein alleged, without the consent of the respective owners thereof, in violation of the 96th Article of War. Thereupon you will have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference, please place the file number of the record in brackets at the end of the published order, as follows:

(CM 277921).

1 Incl
Record of trial

MYRON C. CRAMER
Major General
The Judge Advocate General

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGH -CM 277947

J J APR 1945

UNITED STATES v. Second Lieutenant EDWARD L. McVEY, JR. (O-1118613), Corps of Engineers.	FORT LEWIS Trial by G.C.M., convened at Fort Lewis, Washington, 15 March 1945. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
TAPPY, GAMBRELL and TREVETHAN, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charges and Specifications.

CHARGE I: Violation of the 61st Article of War.

Specification: In that Edward L. McVey, Jr., Second Lieutenant, CE Company K, 52d Engineer Training Battalion, then on temporary duty with the 1631st Engineer Construction Battalion, did, without proper leave, absent himself from his organization at Fort Lewis, Washington, from about 25 February 1945 to about 26 February 1945.

CHARGE II: Violation of the 96th Article of War.

Specification 1: In that Edward L. McVey, Jr., Second Lieutenant, CE Company K, 52d Engineer Training Battalion, then on temporary duty with the 1631st Engineer Construction Battalion, was at Tacoma, Washington on or about 24 February 1945, drunk and disorderly in uniform in a public place, to wit, the Shamrock Tavern, 1327 Broadway, Tacoma, Washington.

Specification 2: In that Edward L. McVey, Jr., Second Lieutenant, CE Company K, 52d Engineer Training Battalion, then on temporary duty with the 1631st Engineer Construction Battalion, having received a lawful order from 1st Lieutenant Thomas P. Edwards to return to the bivouac area of the 1631st Engineer Construction Battalion, the said 1st Lieutenant Thomas P. Edwards being in the execution of his office, did, at Tacoma, Washington, on or about 24 February 1945, fail to obey the same.

Specification 3: In that Edward L. McVey, Jr., Second Lieutenant, CE Company K, 52d Engineer Training Battalion, then on temporary duty with the 1631st Engineer Construction Battalion, having received a lawful order from 1st Lieutenant Thomas P. Edwards to serve as quartering officer for moving Company C, 1631st Engineer Construction Battalion to a new area, the said 1st Lieutenant Thomas P. Edwards, being in the execution of his office, did at bivouac area of 1631st Engineer Construction Battalion, Fort Lewis, Washington, on or about 25 February 1945, fail to obey the same.

Specification 4: (Finding of not guilty).

Specification 5: (Finding of not guilty).

ADDITIONAL CHARGE I: Violation of the 96th Article of War.

Specification: In that Edward L. McVey, Jr., Second Lieutenant, CE Company K, 52d Engineer Training Battalion, then on temporary duty with the 1631st Engineer Construction Battalion, did, at Tacoma, Washington, on or about 24 February 1945, wrongfully apply to his own use and benefit, a one quarter (¼) ton Truck, property of the United States, furnished and intended for military use thereof.

The accused pleaded not guilty to all Charges and Specifications. He was found not guilty of Specifications 4 and 5 of Charge II, but guilty of all other Specifications and of all Charges. No evidence of any previous convictions was introduced. He was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. On 19 February 1945 accused, who was assigned to Company K, 52d Engineer Training Battalion, Fort Lewis, Washington, was placed on temporary duty with Company C, 1631st Engineer Construction Battalion, Fort Lewis, which was then on bivouac. First Lieutenant Thomas P. Edwards, Company Commander of Company C, talked with accused on Friday, 23 February, about a projected move to a new bivouac area on Sunday, 25 February and appointed him quartering officer in charge of the movement after accused had volunteered for this duty (R. 10,13). The next day, Saturday, 24 February, accused and Lieutenant Edwards reconnoitered the proposed bivouac area in the latter's jeep which was driven by Private First Class John J. McGarry. After they had finished their reconnaissance they drove to Lieutenant Edwards' home, arriving there about 4 p.m. (R. 11,13,14,27). Accused requested Lieutenant Edwards' permission to be absent from duty until Sunday morning. This was readily granted but accused thereafter decided not to take advantage of it and stated he was returning to the bivouac area. Lieutenant Edwards then told accused and the driver to return to the bivouac area "right away" because he had some hardware in the

jeep which he wanted brought there (R. 11,14). Accused, however, directed Pfc. McGarry to drive him to the bachelor officers' quarters at Fort Lewis and then to Tacoma where he left McGarry with instructions to meet him in Tacoma later the same night (R. 27).

About 8 p.m. that Saturday evening, 24 February 1945, Private First Class Reno Spinato, Corps of Military Police, saw accused drinking at the bar of the Shamrock Tavern in Tacoma. Accused was clad in a shirt and trousers and had a field jacket and helmet liner with him. He had no blouse, his shirt was open at the neck, and he was unshaven. Accused's eyes were bloodshot and he was "rather unsteady". He was not drunk, but he was "under the influence of liquor". When Pfc. Spinato remonstrated with accused about his appearance, the latter proceeded to ridicule him. He made Spinato spell his name several times and jeered at his rank. Accused was a "little loud" and this conversation attracted the attention of the patrons. Spinato asked accused for his credentials and when accused could produce none Spinato summoned a sergeant of the Military Police who took accused to the Military Police Headquarters. About one hour later when Spinato entered the Shamrock Tavern he again saw accused. There was no conversation between the two on this occasion and accused left a short time thereafter (R. 18-22). When Pfc. McGarry returned to Tacoma to meet accused he was unable to find him (R. 28).

The prosecution introduced an extract copy of the morning report of Company K, 52d Engineer Training Battalion for 26 February 1945 with an entry carrying accused from duty to AWOL on 25 February 1945, and an extract copy of the morning report of the same organization for 28 February 1945 with an entry carrying accused from AWOL to arrest in quarters on 27 February 1945 (R. 16; Pros. Ex. 1). Accused was seen in his quarters on at least five occasions on 26 February and was present there all day on the 27th. Lieutenant Edwards testified that he had not given accused permission to be absent on 25, 26, or 27 February (R. 16,22-26).

4. Accused, after being advised of his rights, elected to be sworn and testify in his own behalf. He stated that he went to Tacoma in his "bivouac clothes", arriving there about 1830 hours. He was drinking beer when the military policeman approached him. Accused asked him to spell his name because the juke box was playing and accused could not understand him. Nevertheless, this angered the military policeman and he summoned a sergeant. Accused and the sergeant left the tavern but accused returned after a short time, the sergeant having given him "a pass" when he was satisfied that accused was an officer. When Pfc. McGarry failed to meet accused with the jeep, accused returned to Fort Lewis on a bus. The next day - Sunday, 25 February - he remained around the bachelor officers' quarters all day. On Monday he tried once, and on Tuesday twice, without success, to procure transportation to the bivouac area from Fort Lewis (R. 29-31).

On cross-examination and examination by the court accused denied that Lieutenant Edwards had ordered him to return to the bivouac area on

Saturday, 24 February. He admitted that despite the fact that Lieutenant Edwards had not given him permission to use the jeep he had directed the driver to take him to Fort Lewis and to meet him at the tavern in Tacoma at 9 p.m. He entered the tavern about 6 p.m., remained about one hour, departed and returned. It was about 7:30 p.m. or 8 p.m. when he was approached by the military policeman. He had asked the military policeman to spell his name four or five times for the purpose of aggravating him because he considered him "pretty smart." He was the quartering officer on Sunday, 25 February, but he made no real effort to reach the bivouac area that day. However, he felt that his presence was not absolutely necessary because the movement had all been planned on Saturday when he and Lieutenant Edwards reconnoitered the new site. Neither was he present for duty on 26 or 27 February although he had made a real effort to that end but he was unsuccessful because the battalion to which he was assigned was on bivouac and he could not obtain transportation (R. 31-39).

5. a. Specification of Charge I:

This Specification alleges that accused was absent without leave from 25 to 26 February 1945. The evidence clearly establishes and the accused admits the absence as alleged. The record, accordingly, fully warrants the findings of guilty of the Specification and the Charge.

b. Specification 1 of Charge II:

This Specification alleges that accused was drunk and disorderly in uniform in a public place. The evidence as to accused's dress and his treatment of the military policeman leaves no doubt that accused was disorderly. In the opinion of the Board of Review, however, it fails to sustain the allegation that accused was drunk. Pfc. Spinato testified that accused was not drunk but was under the influence of liquor. More specifically, he stated that accused had an odor of alcohol on his breath, his eyes were bloodshot, and he was "rather unsteady." The only evidence as to what and how long accused was drinking was furnished by accused who testified he had been drinking beer and that he remained in the tavern one hour. It is undisputed that accused was taken to Military Police Headquarters after his controversy with Spinato merely for the purpose of establishing his identity and released shortly thereafter without, so far as the record shows, any restrictions. It is to be doubted that he would have been set at liberty if accused were appreciably under the influence of intoxicating liquor. Cogent reasons exist for the enforcement of a strict standard of sobriety when officers and soldiers are actually engaged in the performance of a military duty which do not obtain at other times and consequently there is no reason why that definition so at variance with common conceptions of drunkenness should be applied in this case. For the foregoing reasons, we are of the opinion that the record

is legally sufficient to support only so much of the finding of guilty of the Specification as involves a finding that accused was disorderly at the time and place alleged while in uniform, and legally sufficient to support the finding of guilty of the Charge.

c. Specification 2 of Charge II:

This Specification alleges that accused on 24 February 1945, failed to obey a lawful order to return to the bivouac area. The evidence reveals that on Saturday afternoon, 24 February 1945, accused requested permission from his immediate superior to absent himself from duty until the following morning and then, shortly after it was granted, decided not to take advantage of it. Thereafter the evidence is in conflict. Lieutenant Edwards testified that he ordered accused and the driver of the jeep to return to the bivouac area "right away". The accused testified that Lieutenant Edwards merely asked him whether he was going there. The stipulation as to the driver's testimony states that Lieutenant Edwards told the driver to take accused and some hardware back to the bivouac area. While the necessity for the alleged order is not entirely clear from the record particularly in view of Lieutenant Edwards' admitted willingness to excuse accused from duty until the next morning, still the resolution of this conflict in the evidence was in the first instance the function of the court and we cannot say that in finding adversely to the accused their action is without support in the record. The finding of guilty of this Specification was warranted.

d. Specification 3 of Charge II:

This Specification alleges that accused on 25 February 1945 failed to obey a lawful order to act as quartering officer. The evidence shows and accused admits that after he volunteered to act as quartering officer, Lieutenant Edwards designated him as such and that he culpably failed to perform that duty. The finding of guilty of this Specification is clearly warranted.

e. Specification of Additional Charge I:

This Specification alleges that accused on 24 February 1945 wrongfully applied to his own use and benefit a one quarter ton truck, property of the United States, "furnished and intended for military use thereof". The evidence establishes that accused and Lieutenant Edwards used a jeep for the purpose of reconnoitering a new bivouac site. From the references in the record to it as Lieutenant Edwards' jeep it is a fair inference that he was the officer responsible for it and that its use was subject to his direction and control. At the conclusion of the reconnaissance he ordered the driver to return to the bivouac area "right away". Accused, however, directed the driver to take him first to Fort Lewis and then to Tacoma. Later in the evening, pursuant to accused's directions, the jeep was driven into Tacoma to meet accused. These trips were made purely for accused's amusement and had no connection with the

performance of any military duty. There is no evidence, to be sure, of the ownership of this jeep, or that it was furnished or intended for use in the military service of the United States. However, the word "jeep" has become part of the language. It is universally employed to describe a small vehicle owned and used by the Army. Moreover, the evidence shows that it was in fact being used for military purposes. This case comes well within the statement in paragraph 150i, Manual for Courts-Martial, 1928:

> "Although there may be no direct evidence that the property was at the time of the alleged offense property of the United States furnished or intended for the military service thereof, still circumstantial evidence such as evidence that the property was of a type and kind furnished or intended for, or issued for use in, the military service might together with other proved circumstances warrant the court in inferring that it was the property of the United States, so furnished or intended."

The record therefore is legally sufficient to support the finding ofguilty of this Specification and the Charge.

6. War Department records show that accused is 35 years of age and is divorced. He completed two and one half years of college and prior to entering the Army owned his own construction company in Columbus, Ohio. He was inducted into the Army on 20 April 1942 and assigned to the Corps of Engineers. On graduation from The Engineer School on 29 November 1944 he was commissioned a second lieutenant, Army of the United States, and entered on active duty the same day.

7. The court was legally constituted and had jurisdiction of the accused and the subject matter. Except as noted above, no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support only so much of the finding of guilty of Specification 1 of Charge II as involves a finding that accused was disorderly at the time and place alleged while in uniform, legally sufficient to support the findings of guilty of all other Specifications and Charges and legally sufficient to support the sentence and to warrant confirmation of the sentence. The sentence imposed is authorized upon conviction of a violation of either Article of War 61 or Article of War 96.

Thomas N. Tully, Judge Advocate

William H. Gambrell, Judge Advocate

Robert C. Trevethan, Judge Advocate

SPJGH-CM 277947 1st Ind

Hq ASF, JAGO, Washington 25, D. C. [illegible] 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Edward L. McVey, Jr. (O-1118613), Corps of Engineers.

2. Upon trial by general court-martial this officer was found guilty of absence without leave from 25 February 1945 to 26 February 1945 (Specification of Charge I), in violation of Article of War 61; guilty of being drunk and disorderly in uniform in a public place on 24 February 1945 (Specification 1 of Charge II); guilty of failing to obey a lawful order on 24 February 1945 and 25 February 1945 (Specifications 2 and 3 of Charge II); and guilty of wrongfully applying to his own use and benefit a one quarter ton truck, property of the United States, furnished and intended for the military use thereof (Specification of Additional Charge I), all in violation of Article of War 96. He was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support only so much of the finding of guilty of Specification 1 of Charge II as involves a finding that accused was disorderly at the time and place alleged while in uniform, legally sufficient to support all other findings of guilty, and legally sufficient to support the sentence and to warrant confirmation thereof. I concur in that opinion. On 19 February 1945 accused, who was assigned to Company K, 52d Engineer Training Battalion, Fort Lewis, Washington, was placed on temporary duty with Company C, 1631st Engineer Construction Battalion, Fort Lewis, which was then on bivouac about 17 miles southwest of Olympia, Washington. On 23 February 1945, accused, after first volunteering for the duty, was ordered by First Lieutenant Thomas P. Edwards, Company Commander of Company C, to act as quartering officer on Sunday, 25 February 1945, in connection with the movement of Company C to a new bivouac site about 10 miles south of Olympia on Summit Lake. On Saturday, 24 February 1945, after accused and Lieutenant Edwards had reconnoitered the new bivouac area in the latter's jeep, accused requested Lieutenant Edwards' permission to be absent from duty until the next morning. Immediately after Lieutenant Edwards granted accused's request, the latter declined to take advantage of the privilege. Thereupon Lieutenant Edwards ordered accused and the driver of the jeep to return to the old bivouac area "right away." Accused, however, ordered the driver to take him to the Bachelor Officers' Quarters, North Fort Lewis, and then to Tacoma, Washington. On arriving at Tacoma

he directed the driver to meet him with the jeep later that evening. At about 8 p.m. that night accused was sitting at the bar in a tavern in Tacoma. He was not wearing a blouse, his shirt was open at the neck and he had a field jacket and helmet liner with him. When Private First Class Reno Spinato, Corps of Military Police, in the performance of his duty remonstrated with accused about his being out of uniform and the disarray of his clothing, accused ridiculed him, jeered at his rank, and made him spell his name several times. Accused was a "little loud" and in talking to Private First Class Spinato attracted the attention of the patrons. When accused could not produce his credentials he was taken to Military Police Headquarters where he was released when he established his identity. Failing to meet the driver of Lieutenant Edwards' jeep who had returned to Tacoma as he had directed, accused returned to Fort Lewis by bus that night. He remained at Fort Lewis until Tuesday, 27 February 1945, although he was required to be at the bivouac area during that period. In his review the Staff Judge Advocate states that prior to the offenses of which accused here stands convicted, accused was AWOL from 31 January 1945 to about 3 February 1945 and was also found drunk in quarters on 3 February 1945 for which offenses he was reprimanded and fined $50 under Article of War 104. Accused accepted this punishment on 23 February 1945. A report of a neuropsychiatric examination of accused dated 2 March 1945 states that he is a chronic alcoholic.

I recommend that the sentence be confirmed but that the forfeitures be remitted and that the sentence as thus modified be carried into execution.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should such recommendation meet with your approval.

Myron C. Cramer

2 Incls
1. Record of trial
2. Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Findings disapproved in part. Sentence as modified ordered executed. GCMO 304, 7 July 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGK - CM 277961

4 APR 1945

UNITED STATES v. Second Lieutenant JAMES R. BOSWELL (0-781515), Air Corps.	ARMY AIR FORCES WESTERN TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at Lowry Field, Denver, Colorado, 16 March 1945. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
LYON, HEPBURN and MOYSE, Judge Advocates.

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1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 61st Article of War.

Specification 1: In that Second Lieutenant James R. Boswell, Air Corps, Air Corps Unassigned, Attached Squadron T, 3705th Army Air Forces Base Unit (Technical School), did, without proper leave, absent himself from Flight Engineers School at Lowry Field, Denver, Colorado, from about 2 February, 1945, to about 4 February, 1945.

Specifications 2 and 3 are identical with Specification 1 except for the time of the alleged absences without leave, which absences are alleged to have taken place "from about 8 February, 1945, to about 18 February, 1945" and "from about 21 February, 1945, to about 6 March, 1945."

He pleaded guilty to and was found guilty of the Charge and all of its specifications. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Upon motion granted by the court, Specification 1 of the Charge was amended to read "from about 3 February, 1945 to about 4 February, 1945" instead of "from about 2 February, 1945, to about 4 February, 1945."

4. The prosecution did not offer any evidence in support of the Charge or any of its specifications.

5. The accused, having been fully advised concerning his right to testify under oath, to make an unsworn statement, or to remain silent, elected to remain silent. Defense counsel requested the court to take judicial notice of Army Air Forces Regulation No. 50-8 dated 31 December 1942 (R. 7).

6. The accused's plea of guilty, persisted in even after being fully advised of its meaning, is alone legally sufficient in this case to support the findings of guilty.

7. War Department records show the accused to be 26 years of age and single. He graduated from high school and for three years attended college, majoring in Journalism. For two years he was employed by a furniture wholesaler in Brooklyn, New York. He was inducted into the service on 10 October 1941, served with the Infantry in the Aleutian Islands, was appointed an Aviation Student on 13 June 1943 and upon successfully completing his training as a fighter pilot was commissioned second lieutenant, AUS, 27 June 1944. He was punished under Article of War 104 on 20 October 1944 for being absent without leave from 2 October to 5 October 1944.

8. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 61.

Jerry E. Gray, Judge Advocate.

Charles Stebbins, Judge Advocate.

Norman E. Mayo, Judge Advocate.

SPJGK - CM 277961 1st Ind.

APR 14 1945

Hq ASF, JAGO, Washington 25, D. C.,

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant James R. Boswell (O-781515), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed but that the forfeitures be remitted and that the sentence as thus modified be carried into execution.

3. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

3 Incls
1. Record of trial
2. Drft ltr sig S/W
3. Form of Ex action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but forfeitures remitted. G.C.M.O. 177, 9 June 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGH-CM 277965 19 APR 1945

UNITED STATES v. First Lieutenant JOHN J. O'NEILL (0-1311198), Transportation Corps.	NEW YORK PORT OF EMBARKATION Trial by G.C.M., convened at New York Port of Embarkation, Brooklyn, New York, 19 March 1945. Dismissal, total forfeitures and confinement for three (3) years.

OPINION of the BOARD OF REVIEW
TAPPY, GAMBRELL and TREVETHAN, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 93d Article of War

Specification 1: In that First Lieutenant John J. O'Neill, Transportation Corps, assigned to Troop Movement Division, New York Port of Embarkation, Brooklyn, New York, did, at New York, New York, on or about 1 July 1944, feloniously embezzle by fraudulently converting to his own use lawful money of the United States of the value of Three hundred twenty-five ($325.00) Dollars, One hundred fifty ($150.00) Dollars thereof being the property of Technician Fourth Grade Thomas F. Deegan, entrusted to him by the said Technician Fourth Grade Thomas F. Deegan for delivery to Mrs. Thomas F. Deegan, 2433 Pine Street, Philadelphia, Pennsylvania, One hundred ($100.00) Dollars thereof being the property of Technician Fifth Grade Earl A. Perry, entrusted to him for the said Technician Fifth Grade Earl A. Perry by the said Technician Fourth Grade Thomas F. Deegan for delivery to Alder A. Perry, Jr., 105 Sumner Avenue, Norwood, Rhode Island, and Seventy-five ($75.00) Dollars thereof being the property of Technician Fifth Grade Lewis E. Perkins, entrusted to him for the said Technician Fifth Grade Lewis E. Perkins by the said Technician Fourth Grade Thomas F. Deegan for delivery to Mrs. R. M. Perkins, Box #74, Holt, Alabama.

Specification 2: In that First Lieutenant John J. O'Neill, * * *, did, at New York, New York, on or about 1 July 1944, feloniously embezzle by fraudulently converting to his own use lawful money of the United States of the value of Seventy-five ($75.00) Dollars being the property of Sergeant David Hensley, entrusted to him for the said Sergeant David Hensley by Major Arthur G. Hoge for delivery to the wife of Sergeant David Hensley.

Accused pleaded not guilty to and was found guilty of the Charge and Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures and confinement for three years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence introduced by the prosecution is hereinafter summarized under appropriate headings indicating the Specification to which particular evidence is pertinent.

a. Charge, Specification 1:

On 1 July 1944, Staff Sergeant Thomas F. Deegan was aboard HMT Scythia at New York Port of Embarkation preparatory to shipment overseas. Sometime during the morning of that day, accused who was stationed on duty at the Port of Embarkation was asked if there was any way whereby Sergeant Deegan could transmit some money to his home. Accused replied that he could attend to the matter and suggested that the sergeant see him later in the day. About 1100 hours that morning Sergeant Deegan again saw accused and was told by him that he (accused) could arrange to transmit funds for men about to embark and that all men who wished so to do should see him after the conclusion of an officers' meeting he was about to attend. Following these instructions, Sergeant Deegan and Corporals Perry and Perkins met accused at the ship's orderly room about 1200 or 1300 hours that day (R. 6, 7). Each of these noncommissioned officers handed accused an envelope which contained money and on which had been written the name and address of the transmittee, the name, rank, serial number and APO number of the transmittor, and the amount of money inclosed. Sergeant Deegan's envelope contained $150 and was addressed to his wife "Mrs. Thomas F. Deegan, 2433 Pine Street, Philadelphia 3, Pennsylvania." Another envelope contained $75 and was addressed to Mrs. R. M. Perkins, Holt, Alabama, and the third envelope contained $100 and was addressed to Mr. Alder A. Perry, Jr., 105 Sumner Avenue, Norwood, Rhode Island. Accused counted the money in each envelope, sealed the envelopes and placed them in his pocket. Sergeant Deegan then asked accused to exhibit his identification card and also requested a receipt for the money. Accused wrote out a "blanket" receipt which was worded as follows, viz:

"Received from Sgt Deegan $325.00 which I will forward to their families.

(signed) Lt. John J. O'Neill 01311198
1st Lt., TC
Troop Movement Div
NYPE"

After accused took possession of these envelopes and their contents Sergeant Deegan did not see him again (R. 8-11; Pros. Ex. 1).

At no time subsequent to 1 July 1944 did Sergeant Deegan's wife, Mrs. Thomas F. Deegan, receive $150 either from her husband or from the accused (R. 19, 20). Alder A. Perry, Jr., the brother of Corporal Perry, never received the sum of $100 either from his brother or from the accused except for several remittances each in the amount of $100 sent by Corporal Perry from overseas at intervals after 1 July 1944 (R. 20-22). It was stipulated by the prosecution, defense and the accused that if Mrs. R. M. Perkins, Box #74, Holt, Alabama, were present she would testify that "she did not receive $75.00 from Technician 5th Grade Lewis E. Perkins from or through the accused, First Lieutenant John J. O'Neill, after 1 July 1944" (R. 32).

b. Charge, Specification 2:

On 1 July 1944, about 1000 hours, while Major Arthur G. Hoge, Jr. and his organization, the 275th Armored Field Artillery Battalion, were embarking on the Scythia for shipment overseas, he encountered accused and inquired of him if there was any procedure whereby his men might send surplus funds to their homes. Accused stated he would see what could be done and when Major Hoge met him again about 1200 hours accused informed him that he had not as yet found any way to handle the matter. About 1500 hours the two met for the third time and accused informed Major Hoge that he would try to arrange with the Red Cross to transmit any funds the men might wish to send. Major Hoge had in his possession $75 which a Sergeant Hensley had given to him to send promptly to the sergeant's wife who was about to enter a hospital. It was in an unsealed envelope which was addressed to Mrs. Hensley and bore the sergeant's return address. He informed accused of the urgency of the matter so accused accepted the money and agreed to send it by money order to the sergeant's wife. Major Hoge gave accused 25 cents or 50 cents to pay for the money order. Accused gave the major no receipt for the money nor did he ever return the money to him (R. 13-16).

It was stipulated by the prosecution, defense and the accused that if the wife of Sergeant David Hensley were present she would testify that "she did not receive $75.00 from Sergeant David Hensley from or through First Lieutenant John J. O'Neill, the accused, on or after 1 July 1944" (R. 32).

During an investigation conducted by Major Thayer Chapman of the Inspector General's Department, Major Chapman interviewed accused on or about 23 August 1944 and, after his rights had been explained to him, accused proceeded to state that he was billeting officer for the Scythia on 1 July 1944 and that he met Technician Fourth Grade Deegan aboard the Scythia on that day and received from the sergeant the total sum of $325 with the request that it be sent to three different addressees. Accused gave Sergeant Deegan a receipt for the money so turned over to him (R. 26). Major Chapman interviewed accused further on 14 December 1944 and, after again being advised of his rights, accused stated that he had no financial transaction with Major Hoge aboard the Scythia on the day in question and had not received from him $75 or any letter or package to be mailed (R. 27). Accused stated that he saw Major Hoge several times during that day and that each time Major Hoge questioned him as to whether or not the Red Cross intended to send a representative to the ship to take care of the money various men wished to transmit to their homes (R. 28). Accused also stated that about 7:30 p.m. on 1 July he returned to Sergeant Deegan the $325 he had previously received inasmuch as he had been unable to obtain the requisite money orders and he instructed Sergeant Deegan to destroy the receipt that accused had given to him (R. 29).

4. Evidence for the defense:

First Lieutenant Ernest W. Neubig testified that from 1100 hours until 1700 hours on 1 July 1944 accused, under Lieutenant Neubig's supervision, acted as pier officer during loading of the ship Dominion Monarch. After 1700 hours accused was scheduled to serve as billeting officer in charge of loading of the Scythia. The Dominion Monarch was moored two piers removed from that at which the Scythia was located (R. 35, 36). Although Lieutenant Neubig did not have accused under constant observation he did not believe it possible for accused to have boarded the Scythia on 1 July 1944 between the hours of 1100 and 1700 (R. 38, 40).

Three officers testified relative to accused's character, one stating that accused's reputation for honesty was "very high" and that his reputation for truthfulness was "very trustworthy" while the other two respectively described his reputation for honesty as "perfectly all right" and as "excellent" (R. 44, 46, 48).

5. The prosecution's evidence conclusively establishes that accused was entrusted with a total of $325 and shortly thereafter with the sum of $75, all of which were funds of enlisted men entrusted to accused to mail as they had directed. None of the money was received by any of the four individuals for whom it was intended nor was it ever accounted for by the accused. Such circumstances compel the logical conclusion that accused misappropriated the entrusted funds.

Although the defense sought to cast doubt upon the identification of the accused by introducing evidence to indicate that he was not aboard the Scythia at the time in question, the court was fully warranted in disbelieving that evidence in view of the testimony of Major Hoge and Sergeant Deegan identifying accused as the individual to whom they had entrusted the funds plus the documentary evidence establishing that accused issued a receipt for $325 to Sergeant Deegan and accused's own admission made to Major Chapman of the Inspector General's Department in which he acknowledged that he was present aboard the Scythia and did receive that sum of money from Sergeant Deegan. The evidence in the record of trial sustains all findings of guilty.

6. Accused is 24 years of age. War Department records show that accused attended high school for 3½ years but did not graduate therefrom. He worked as a truck helper from 1937 to 1938 and as a messenger for RKO Theatres Corporation from 1938 to 1940. He entered upon active military duty in the grade of sergeant on 15 October 1940 as a federally recognized member of the National Guard of New York. On 15 February 1943 he was commissioned a second lieutenant after graduation from the Infantry Officer Candidate School, Fort Benning, Georgia.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 93.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

SPJGH-CM 277965 1st Ind

Hq ASF, JAGO, Washington 25, D. C.

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant John J. O'Neill (0-1311198), Transportation Corps.

2. Upon trial by general court-martial this officer was found guilty of embezzling the total sum of $400, in violation of Article of War 93. He was sentenced to dismissal, total forfeitures and confinement for three years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I concur in that opinion. On 1 July 1944 while accused was serving as billeting officer aboard the ship Scythia at the New York Port of Embarkation, he accepted three envelopes containing $150, $100 and $75, respectively, from three enlisted men about to embark for overseas duty, and agreed to mail the envelopes and their contents for the enlisted men to the addressees whose names appeared thereon (Chg., Spec. 1). He also accepted another sum of $75 which he agreed to mail to a named addressee for a fourth enlisted man also about to embark for overseas duty (Chg., Spec. 2). Accused did not dispatch any of the money as directed but he appropriated it to his own use.

I recommend that the sentence be confirmed but that the forfeitures be remitted, and that the sentence as thus modified be carried into execution and that the Federal Reformatory, Chillicothe, Ohio, be designated as the place of confinement.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

MYRON C. CRAMER
Major General
The Judge Advocate General

2 Incls
1. Record of trial
2. Form of action

(Sentence confirmed but forfeitures remitted. G.C.M.O. 247, 19 June 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGK - CM 277983

4 APR 1945

UNITED STATES v. General Prisoners KELLEY D. ROBINSON, RAYMOND R. HARRISON, LAWRENCE W. POMPILI, MELVIN E. PROCTOR and EARLE F. HENDERSON.	EIGHTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Hood, Texas, 22 and 23 February 1945. Robinson and Proctor: Dishonorable discharge and confinement for ten (10) years. Harrison, Pompili and Henderson: Confinement for ten (10) years. Pompili and Henderson: Penitentiary. Others: Federal Reformatory, El Reno, Oklahoma.

HOLDING by the BOARD OF REVIEW
LYON, HEPBURN and MOYSE, Judge Advocates.

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1. The Board of Review has examined the record of trial in the case of the general prisoners named above, and finds it legally sufficient to support all findings of guilty as to all accused, except in the one respect hereinafter noted, and to support all the sentences. The only feature which requires consideration is the legal sufficiency of the record to support the finding that accused, Pompili, acting jointly with accused, Robinson and Harrison, and in pursuance of a common intent, wrongfully took and used a one-quarter ton truck, the property of the United States, without the consent of the owner, as charged in Specification 1 of Charge III.

2. The record shows that Pompili, together with five other general prisoners, confined in the Southern Branch, United States Disciplinary Barracks, Camp Hood, Texas, escaped from the barracks on the morning of 4 January 1945. That same morning a quarter-ton truck, commonly referred to as a "jeep", assigned to the 139th Tank Destroyer Training Battalion, North Camp Hood, Texas, could not be found at its proper location in the motor pool. The following morning, 5 January, this truck was discovered about five miles southwest of Temple, Texas, near which city Camp Hood is located, out of gas and with the battery in a run-down condition. On the night of 4-5 January, Pompili, Harrison and Robinson were apprehended by Texas State Highway Patrolmen near Milano Junction, a village approximately twenty miles southeast of Temple, in a Ford sedan belonging to one Garland Jennings, which had been taken without the latter's consent from in front of his house in Temple about 10 o'clock in the evening of 4 January.

Pompili, Harrison and Robinson subsequently made and signed statements in which they admitted, in effect, that they and three other

general prisoners had escaped at approximately the same time on the morning of 4 January; that they had separated from this second group of three and caught a ride to the outskirts of Temple in a 2-1/2 ton semi-trailer, which they had "hopped" without the knowledge of the driver, and that later they took a Ford sedan, in which they were traveling when apprehended by the State Police. Subsequently Robinson made a supplemental written statement, in which he declared that he, Harrison and Pompili had taken a "jeep" from the motor pool at North Camp Hood and had driven in this jeep to about four miles south of Temple, when the "jeep" ran out of gas. They had then abandoned it. He further stated that his prior declaration that they had "hitch-hiked" in the 2-1/2 ton semi-trailer was false. Harrison orally made a similar correction and retraction, but refused to sign the additional declaration after it had been transcribed. There is nothing in the record to indicate that Pompili in any manner changed his original confession.

The several confessions of these three accused were made after the abandonment or commission of their common design. Consequently, under the clear and definite rule laid down in paragraph 114c, Manual for Courts-Martial (1928), which is in accordance with the principle followed generally in the civil courts, the confessions made by Robinson and Harrison are inadmissible against Pompili, and the court erred in its ruling, over the objection of defense counsel, that a common design having been established, each confession was admissible "generally" against all three (CM 176607, Dig. Op. JAG 1912-40, p. 209). In so far as Pompili is concerned, therefore, the only legal evidence which may be considered to connect him with the unauthorized appropriation and use of the quarter-ton truck is that he escaped from the disciplinary barracks at Camp Hood on the morning of 4 January at approximately the same time as five other general prisoners; that a quarter-ton truck was missing from another portion of Camp Hood the same morning; that the following morning this truck was found out of gas on a roadside, near Temple, Texas, the nearest city to Camp Hood; and that some hours prior to its discovery Pompili, with the two prisoners with whom he had joined at the time of the escape and with whom he had "hitch-hiked" into Temple in a 2-1/2 ton semitrailer, according to his confession, had been apprehended about twenty-five miles from Temple in a Ford sedan, which they had jointly taken without the permission of the owner.

It has been properly held that:

> "'Convictions by courts-martial may rest on inferences but may not be based on conjecture' and 'if any part of a finding of guilty rests on an inference of fact, it is the duty of the Board of Review to determine whether there is in the evidence a reasonable basis for the inference' (CM 223336, Wills, JAG Bull., Aug. 1942, p. 159." (CM 259158, Grice.)

Applying this sound principle to the present case, the Board of Review is constrained to hold that the facts, as disclosed by the record,

are not legally sufficient to establish that accused, Pompili, was connected with the unauthorized appropriation and use of the quarter-ton truck.

4. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the finding of guilty of Specification 1 of Charge III, in so far as accused, Pompili, is concerned, but legally sufficient to support all other findings of guilty and all the sentences.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGK - CM 277983 1st Ind.

Hq ASF, JAGO, Washington 25, D. C.

TO: CG, 8th SvC, Dallas 2, Texas

1. In the case of General Prisoners Kelley D. Robinson, Raymond R. Harrison, Lawrence W. Pompili, Melvin E. Proctor and Earle F. Henderson, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally insufficient to support the finding of guilty of Specification 1 of Charge III in so far as accused Pompili is concerned, but legally sufficient to support all other findings of guilty and all the sentences, which holding is hereby approved. Upon disapproval of the finding of guilty of Specification 1 of Charge III in so far as it pertains to accused Pompili you will have authority to order the execution of the sentences.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM 277983).

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

1 Incl
Record of trial

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

6 APR 1945

SPJGV-CM 278011

UNITED STATES v. Private CHARLES H. FOX (19147941), Second Air Force Classification and Routing Pool, Provisional Squadron H.	SECOND AIR FORCE Trial by G.C.M., convened at Lincoln, Nebraska, 10 March 1945. Dishonorable discharge and confinement for eight (8) years. Federal Reformatory.

HOLDING by the BOARD OF REVIEW
SEMAN, MICELI and BEARDSLEY, Judge Advocates.

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1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 93d Article of War.

Specification 1: In that Private Charles H. Fox, Second Air Force Classification and Routing, Provisional Squadron H, did, at Porterville, California, on or about 16 January 1945, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

Porterville, California, Jan 16 19 45 No. _____

Porterville Branch
SECURITY-FIRST NATIONAL
BANK OF LOS ANGELES
Oak & Main

90-364
12

Pay to the order of Charles Fox $ 100 84/100

One hundred and 84/100 Dollars

for pruning Mrs. C. R. Lamb

Indorsements on reverse side:
/s/ Charles Fox

which said check was a writing of a private nature, which might operate to the prejudice of another.

Specification 2: In that Private Charles H. Fox, Second Air Force Classification and Routing Pool, Provisional Squadron H, did, at Porterville, California, on or about 16 January 1945, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

Porterville, California, Jan. 16 19 45 No. _____

Porterville Branch
SECURITY-FIRST NATIONAL 90-364
BANK OF LOS ANGELES 12

Pay to the order of Oak & Main
Charles Fox $ 35 30/100
Thirty five and 30/100 Dollars
Picking oranges Mrs. C. R. Lamb

which said check was a writing of a private nature, which might operate to the prejudice of another.

CHARGE II: Violation of the 58th Article of War.

Specification: In that Private Charles H. Fox, Second Air Force Classification and Routing Pool, Provisional Squadron H, did, at Lincoln Army Air Field, Lincoln, Nebraska, on or about 1 July 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Long Beach, California on or about 18 January 1945 and returned to military control at Hammer Field, Fresno, California about 25 January 1945.

He pleaded guilty to Charge I and to its Specifications, and to the Specification of Charge II he pleaded guilty except the words "desert" and "in desertion", substituting therefor the words "absent himself without proper leave from", and "without leave", to the excepted words not guilty, and to the substituted words, guilty, and to Charge II, not guilty, but guilty of a violation of the 61st Article of War. Evidence of one previous conviction was introduced. He was found guilty of all the Specifications and the Charges, and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for eight years. The reviewing authority approved the sentence, designated the Federal Reformatory, El Reno, Oklahoma, as the place of confinement, and forwarded the record for action under Article of War 50½.

3. No question arises as to the legal sufficiency of the record to support the findings of guilty of Charge II and its Specification.

4. After the accused had pleaded, the law member warned accused of the meaning and effect of his pleas of guilty, and inquired whether he understood

such warning. Accused answered in the affirmative. The law member then inquired, "Do you still desire to plead guilty?" To this question, accused replied: "To absence without leave, yes, sir." (R. 7) Although the reply is ambiguous, it is possible to construe it as a reaffirmation of the plea which accused had interposed to Charge II and its Specification and it may not unreasonably be regarded, by implication at least, as a withdrawal of the pleas of guilty to Charge I and its Specification, relating to the forgery of two checks described therein. It may be said, therefore, that as to the Specifications charging forgery the burden rested upon the prosecution of offering evidence to prove accused's guilt, as though pleas of not guilty had been interposed to Charge I and its Specifications (A.W. 21; CM CBI 111, Gumm).

A written stipulation, signed by accused and by his individual counsel and by the trial judge advocate (Pros. Ex. 1) was admitted in evidence (R. 8), after the law member questioned accused, who stated that he had signed it voluntarily. With it were admitted two checks, which by agreement (R. 9) were withdrawn and photostatic copies in lieu thereof were incorporated in the record. Each check is dated 16 January 1945, is drawn upon the Security National Bank of Los Angeles, Porterville Branch, to the order of Charles Fox, in the amounts respectively of $100.84 and $35.30, purports to be signed by Mrs. C. R. Lamb, and is indorsed by Charles Fox.

The stipulation recites that if Mrs. C. R. Lamb were present, she would testify that the signatures on such checks were not affixed by her and were not her signatures, that she was not indebted to Charles H. Fox, and that she did not draw or authorize anyone to draw for her such checks to the order of Charles H. Fox.

It was further stipulated that if he were present, the letter of the Porterville branch of Security First National Bank of Los Angeles would testify that the accused personally presented the check for $100.84 at the bank for payment on or about 16 January 1945 and received therefor the sum of $100.84 in lawful money; and that if he were present, a clerk for the J. C. Penny Company of Porterville, would testify that accused personally presented the other check to him on or about 16 January 1945 and received therefor $35.30 in lawful money (Pros. Ex. 1).

Accused, after being duly advised of his rights (R. 10), was sworn as a witness and testified. His testimony was confined exclusively to his unauthorized absence. No question was put to him by his counsel, or by the prosecution on cross-examinations, concerning the forging and uttering

of the two checks. His possession of the checks at the time he held them out as true and genuine and obtained the amounts thereof, is unexplained.

5. Forgery is the false and fraudulent making or altering of an instrument which would, if genuine, apparently impose a legal liability upon another, and to prove guilt of the offenses here charged it was essential to establish (1) that two certain checks were falsely made (2) that the checks were such that if genuine legal liability apparently would be imposed upon another; (3) that it was the accused who so falsely made such checks, and (4) facts and circumstances indicating the intent of accused to defraud another (M.C.M. 1928, par. 149j).

All will agree that the evidence as stipulated clearly establishes the first, second and fourth elements of the proof essential to valid findings of guilty of Charge I and its Specifications. However, there is no direct evidence that it was the accused who falsely made the two forged checks. May this essential link in the chain of proof be inferred from the facts and circumstances in evidence? After a careful and thorough examination of the authorities we feel that this question must be answered in the affirmative, since the principle seems to be almost universally recognized that to support a conviction of forgery, it is not essential to prove actual manual execution of the forged writings by the accused (State v. Phares, 120 Kan. 172, 243 Pac. 266, 267), because proof of possession of the forged instruments by accused, with a claim of title thereunder raises a presumption that accused forged or procured them to be forged, which presumption is conclusive in the absence of any explanation by the accused (26 C.J. 961, 37 C.J.S. 91). It has been held that such presumption is not overcome by evidence that the accused was unable to write (State v. Lane, 80 N.C. 407).

In State v. Williams, 152 Mo. 115, 53 S.W. 424, 426, 75 Am. St. R. 441, it was held that:

> "One who is recently in possession of and attempts to sell or obtain money on a forged note is presumed to have forged the same, and unless such possession or forgery is satisfactorily explained, the presumption becomes conclusive."

In that case the defendant had previously been acquitted of the uttering of the instrument in question. It was held that he was properly convicted of having forged it. It was remarked in that opinion that the presumption arising from the possession of fruits of crime is with reason indulged in prosecutions for forgery, upon the same considerations which

have actuated the courts in larceny cases, in which the recent possession of stolen property is prima facie evidence that the possessor is the thief, and unless explained raises a conclusive presumption of guilt.

In Green v. State, 152 Miss. 282, 119 So. 808, the defendant indorsed the name of the payee on two checks, and obtained money in the amounts for which the checks were drawn. It subsequently developed that the name of the maker in each instance had been forged. The defendant was held to have been properly convicted of forgery, since his possession of the forged checks was not explained and therefore was sufficient to warrant his conviction. It was said:

> "This is but an application of the presumption of guilt from the possession of property which this court has uniformly applied in cases of larceny."

In State v. Regna, 108 N.J. Law, 157 Atl. 100, it was said that from the very nature of the crime of forgery direct proof of the crime could seldom be obtained and that the presumption that one possessing and claiming under a forged instrument had forged it was therefore established by our law.

A distinction is made in the decisions between a case such as that presented by this record, where the accused was the payee of the forged instrument, and cases wherein the forged check appeared to have been indorsed in blank by the purported payee, before being indorsed and passed by the defendant, and the presumption of guilt of forgery is held not to arise from the possession of a forged check so indorsed in blank (State v. Waterbury, 133 Iowa 135, 110 N.W. 328, 330). Except for decisions dealing with this latter type of factual situation, our research has failed to disclose any decision holding that a presumption of guilt does not arise from unexplained possession of a forged check, and the rule appears to be generally recognized and followed in cases such as that here under consideration (Overby v. State, 24 Ala. App. 254, 133 So. 915, 916; State v. Allen, 53 Ida. 737, 27 Pac. 2d 481, 485; Ratliff v. State, 175 Tenn. 172, 133 S.W. 470, 471), except in California where, in People v. Calpestri, 54 Calif. App. 45, 200 Pac. 1054, 1056, it has been held, the law having been codified, there can be no presumption from evidence in the absence of statutory authorization, but that decision carefully makes a distinction between the code and the common law, as recognized in other states.

In Commonwealth v. Talbot, 2 Allen 161, the Supreme Judicial Court of Massachusetts held that the trial court properly instructed the jury that defendant's possession of a forged receipt was "strong evidence" tending

to prove that he forged it, or caused it to be forged, and affirmed the conviction of defendant upon an indictment charging the forging of the receipt.

In Denis v. Commonwealth, 144 Va. 559, 131 S.E. 131, 141, the possession of a forged instrument was said to be like the possession of goods recently stolen, and to raise the presumption that the instrument was forged by the party having possession.

In State v. Britt, 14 N.C. 122, it was said:

> "It is next to impossible that the defendant could get possession of such an instrument as this, purporting to be for his own benefit, without having fabricated or aided in the fabrication of it. If the instrument be a forgery, he who holds it under such circumstances is taken to be the forger, unless he shows to the contrary."

To the same effect are the decisions in State v. Peterson, 129 N.C. 556, 40 S.E. 9, 85 Am. St. Rep. 756, and State v. Jestes, 185 N.C. 735, 117 S.E. 385.

This presumption has heretofore been recognized and applied by this office in a forgery case (Dig. Ops. J.A.G. 1912-40, par. 451 (27)).

6. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence.

(Sick in Quarters), Judge Advocate

A. L. Wendell, Judge Advocate

Grenville Keedsley, Judge Advocate

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGN-CM 278054

UNITED STATES	)	INFANTRY REPLACEMENT TRAINING CENTER CAMP GORDON, GEORGIA
v.	)	Trial by G.C.M., convened at Camp Gordon, Georgia, 22 March 1945. Dismissal.
First Lieutenant FRANK A. GIARDINA (0-1046451), Coast Artillery Corps.	)	

OPINION of the BOARD OF REVIEW
LIPSCOMB, O'CONNOR and MORGAN, Judge Advocates

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1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charges and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification: In that First Lieutenant Frank A. Giardina, Company A, 21st Training Battalion, 6th Training Regiment, Infantry Replacement Training Center, did, at Camp Gordon, Georgia, on or about 13 February 1945, wrongfully borrow the sum of $20.00, lawful money of the United States, from Private First Class Edward A. Miller, Company B, Casual Battalion, Infantry Replacement Training Center, Camp Gordon, Georgia, the said Private First Class Edward A. Miller being then a member of Company A, 21st Training Battalion, 6th Training Regiment, Infantry Replacement Training Center, Camp Gordon, Georgia.

ADDITIONAL CHARGE: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant Frank A. Giardina, Company A, 21st Training Battalion, 6th Training Regiment, Infantry Replacement Training Center, did, at Camp Gordon, Georgia, on or about 12 February 1945, wrongfully and unlawfully make and utter to Camp Gordon Exchange, a certain check, in words and figures as follows, to wit:

THE NATIONAL EXCHANGE BANK
Of Augusta 64-33

Augusta, Ga. February 12, 1945

Pay to the order of Camp Gordon Exchange----------$ 25.00

Twenty-five and ----------no/100 Dollars

No. 123

/s/ Frank A. Giardina
1st Lt., CAC
01046451

endorsed on the reverse side as follows:

Frank A. Giardina
1st Lt., CAC
Co A, 21st Bn., 6th Regt

and other endorsements which are illegible, he, the said First Lieutenant Frank A. Giardina, then well knowing that he did not have and not intending that he should have sufficient funds in The National Exchange Bank of Augusta, for the payment of said check, such conduct being of a nature to bring discredit upon the military service.

Specification 2: In that First Lieutenant Frank A. Giardina, Company A, 21st Training Battalion, 6th Training Regiment, Infantry Replacement Training Center, did, at Camp Gordon, Georgia, on or about 13 February 1945, wrongfully and unlawfully make and utter to Camp Gordon Exchange, a certain check in words and figures as follows, to wit:

THE NATIONAL EXCHANGE BANK
Of Augusta 64-33

Augusta, Ga. 13 February 19 45

Pay to the order of Camp Gordon Exchange ----------$25.00

Twenty-five and ----------no/100 Dollars

No. 25

/s/ Frank A. Giardina
1st Lt. CAC 01046451

and other endorsements which are illegible, he, the said First Lieutenant Frank A. Giardina, then well knowing that he did not have and not intending that he should have sufficient funds in The National Exchange Bank of Augusta for the payment of said check, such conduct being of a nature to bring discredit upon the military service.

The accused pleaded not guilty to, and was found guilty of, both Charges and Specifications thereunder. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that a check in the sum of $25.00, drawn upon The National Exchange Bank of Augusta, Georgia, and "signed with the name" of the accused was cashed by Branch #3 of the Camp Gordon Exchange, Camp Gordon, Georgia, on 12 February 1945. (R. 10-11; Pros. Exs. 1, 2). The following day another check in the same amount, addressed to the same drawee bank, and bearing the same signature was also cashed by Branch #3 (R. 12-13, 18-19; Pros. Exs. 3, 4). An account in a name identical with that of the accused had been opened with The National Exchange Bank of Augusta, Georgia, on 2 January 1945. The net balance to the credit of the depositor was $7.45 as of 12 and 13 February 1945, $6.45 as of 15 February 1945, and $5.45 as of 16 February 1945. The first check was presented to the drawee bank for payment on 15 February 1945 and the other on 16 February 1945. Both were dishonored because of insufficient funds (R. 15-17; Pros. Ex. 5; Def. Ex. A). Aside from the identity of names, no proof was offered to establish that the accused had executed the two checks or that the account at The National Bank of Augusta, Georgia, was his. The signatures on the two instruments were, however, similar to that on the signature card obtained by the bank at the time the account was opened (R. 11, 13-16).

On 13 February 1945 the accused borrowed $20.00 from a private first class in his company named Edward A. Miller and promised to repay the sum the following day (R. 8). When Miller attempted to collect his money in accordance with the arrangement entered into, the accused was unable to meet his obligation in cash. Instead, the accused executed a check for the entire sum post-dated 16 February 1945. Upon presentation to the bank on that date by Miller, it was marked "No funds." He immediately complained to a "Lt. Rothenberg" who in turn contacted a "Major Beidleman." Some time later that same day the accused satisfied his indebtedness to Miller in cash (R. 8-10). Miller had no knowledge of any attempt by the accused to call him prior to the time that "Major Beidleman's" attention had been invited to the transaction (R. 10).

4. After being apprised of his rights relative to testifying or remaining silent, the accused took the stand on his own behalf. The

only other witness presented by the defense was Captain Edward R. Massie, Jr. For a period of two or three months he had been the accused's battery commander at Camp Davis, North Carolina. A "General Schuyler" had originally brought the accused to that post "to take over the inspection of small arms and the maintenance of small arms" for the "entire AAATC." Upon completing this assignment the accused was attached to Captain Massie's organization. According to Captain Massie, the accused was an "expert" in small arms and as a member of the battery "his efficiency would be rated as excellent for the work he was doing" (R. 20-22).

In his own testimony the accused briefly reviewed both his civilian and Army careers. Subsequent to the date on which he was commissioned he received intensive training in the use of the .50 caliber machine gun and attended "the half-track school." By virtue of this background he was designated as the "self-propelled half-track .50 cal machine gun specialist for the AAATC." Subsequently he was attached to Camp Davis by order of "Brigadier General Schuyler" and placed in charge of the "inspection, maintenance and repair of small arms, 90 mm's, 37 mm's and all types of antiaircraft guns." The purpose of this assignment was to prevent "kick-backs" on materials shipped to Ports of Embarkation. In the performance of his duties the accused was assisted by a group of other officers all of whom were under his supervision (R. 23-24, 26).

He admitted borrowing $20.00 from Private Miller and executing and cashing the two worthless checks constituting the gravamen of the Specifications under Charge II. At the time of these acts he was experiencing financial stringency because of two emergency leaves necessitated by the illness and pregnancy of his wife and the illness of his mother-in-law (R. 24-25, 27). The unusual expenses entailed were met in part by loans from his father. The dishonoring of the two checks to the Camp Gordon Exchange was attributed in part to an error in calculating the balance in the account with The National Bank of Augusta. Three other checks, each in the sum of $25.00, had been issued by the accused in February of 1945, and, having inadvertently failed to record them in his "check book", he had completely forgotten about them (R. 25-26).

In the transaction with Miller he had not given "a thought" to the propriety of his borrowing from an enlisted man. Although he then believed that he had $75.00 on deposit in his checking account, his duties did not permit him to visit the bank (R. 26). He was expecting a

remittance from home and intended to apply a part of it to the satisfaction of the debt to Miller. The next day the accused was placed in arrest in quarters. Miller came to see him about the loan and, upon being told that the money had not arrived, proposed that he be given a post-dated check in lieu of cash. The accused was now aware of the fact that he did not have $75.00 in his account, and, although he executed the instrument suggested, he warned that the remittance might not come by 16 February 1945 and that he might not be permitted to go to the bank to make a deposit. Miller nevertheless accepted the check but asked that he be notified in the event that the money was not received on 16 February 1945. In compliance with this request the accused attempted to contact Miller by telephone that day before Major Beidleman intervened. The purpose of the call was to inform Miller that no bank deposit had been made and to request him to "come over" to collect the amount due him in cash (R. 24).

5. The Specification of the Charge alleges that the accused did, "on or about 13 February 1945, wrongfully borrow the sum of $20.00 ..... from Private First Class Edward A.Miller....." This offense was laid under Article of War 96.

The prosecution has established, and the accused has admitted, that he borrowed a sum of money from an enlisted man, who was a member of the same company. As was said in II Bull. JAG, April 1943, p. 144, sec. 454 (19):

> "It is prejudicial to good order and military discipline for an officer to borrow money from an enlisted man in the same organization. The obligation that flows from indebtedness to a subordinate tends to weaken authority; it can become the cause of improper favor; it impairs the integrity of required relationships. CM 230736 (1943)". See also 31 B.R. 289, CM 248934, Murray (1944).

In this particular instance the gravity of the offense was increased by the accused's execution of a worthless check in payment of his obligation to Private Miller. The Specification of Charge I has been proved beyond a reasonable doubt.

6. Specifications 1 and 2 of the Additional Charge allege that the accused did "wrongfully and unlawfully make and utter to Camp Gordon Exchange" two different checks, each in the sum of $25.00, on 12 February and 13 February 1945, respectively, he "then well knowing that he did not have and not intending that he should have sufficient funds in

The National Bank of Augusta [the drawee institution], for the payment of said check [s] such conduct being of a nature to bring discredit upon the military service." These acts were also set forth as violations of Article of War 96.

Although the evidence adduced by the prosecution failed to link the accused with the two checks mentioned, he has by his own testimony supplied the omitted proof. He has admitted that he executed them, presented them for cashing to the Camp Gordon Exchange, and received their full face value in cash. In the absence of any showing of "honest mistake" on his part, this combination of circumstances constitutes the essential elements of an offense under Article of War 96. To quote III Bull. JAG, July 1944, p. 290, sec. 454 (67):

> "A member of the military establishment is under a particular duty not to issue a check without maintaining a bank balance or credit sufficient to meet it. Proof that a check given for value by a member of the military establishment is returned for insufficient funds imposes on the drawer of the check, when charged with conduct to the discredit of the military service, the burden of showing that his action was the result of an honest mistake not caused by his own carelessness or neglect. CM 249232 (1944)."

Similarly in IV Bull. JAG, January 1945, p. 4, sec. 295 (37), it was held that, "the passing of worthless checks without intent to defraud constitutes conduct of a nature to bring discredit upon the military service in violation of A.W. 96."

The court was justified in inferring from the evidence adduced before it that the accused knew that he did not have sufficient funds on deposit and did not intend to have; for, since the status of his account resulted from his own acts, he was "properly chargeable with knowledge of it." 29 B.R. 325; CM 245908, Riley, (1944). This rule is particularly apropos in this case in the light of his six and a half years of experience as an accountant. It is incredible that anyone with such a background would overlook withdrawals of $75.00 out of a bank balance which during the months of February and March 1945 never exceeded $273.25 and which usually contained much less (Def. Exs. A, B). The attempt to explain the execution of the two checks as the result of an honest error is convenient but not persuasive. While the testimony relative to the accused's abnormal expenses may arouse some sympathy for him, it cannot legally excuse the offense of wrongfully and unlawfully making and uttering checks without sufficient funds. The Specifications of the Additional Charge have been sustained beyond a reasonable doubt.

7. The accused, who is married and the father of two children, is about 30 years old. Subsequent to his graduation from high school in 1934, he attended Soule Business College in New Orleans, Louisiana, for one year. From 1935 to 1939 he was employed as an assistant bookkeeper and from 1939 to 1941 as an accounting clerk. After enlisted service from 11 September 1941 to 11 November 1942, he was commissioned as a second lieutenant on 12 November 1942. On 24 April 1943 he was promoted to first lieutenant. Disciplinary action under Article of War 104 was taken against him on 26 December 1944 for cashing four worthless checks. According to the Staff Judge Advocate's Review, the accused between 29 November 1944 and 9 February 1945 gave "the local Camp Exchange at least 10 worthless checks of an aggregate value of $220.00."

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

Abner E. Lipscomb, Judge Advocate

Robert J. Conner, Judge Advocate

Samuel Morgan, Judge Advocate

SPJGN-CM 278054 1st Ind
Hq ASF, JAGO, Washington 25, D. C.
TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Frank A. Giardina (0-1046451), Coast Artillery Corps.

2. Upon trial by general court-martial this officer was found guilty of wrongfully borrowing money from an enlisted man and of wrongfully and unlawfully making and uttering two worthless checks, all in violation of Article of War 96. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof.

On 12 and 13 February 1945, respectively, the accused drew and cashed two checks, each in the sum of $25, at the Camp Gordon Post Exchange. His net balance in the drawee bank, both on those dates, and on the dates on which the instruments were presented for payment, did not exceed $7.45. These two checks were dishonored because of insufficient funds. On 13 February 1945 the accused also borrowed $25 from an enlisted man who was a member of the same organization. Although this sum was to be repaid the following day, the accused had no cash available when demand was made upon him, so instead he made and delivered to the enlisted man a check postdated 16 February. Payment of this instrument was refused by the drawee bank, but the accused, primarily because of the intervention of a superior officer, immediately thereafter satisfied the obligation by paying cash in full. The transaction described above followed the issuance by accused of at least ten worthless checks in the aggregate sum of $220 between 29 November 1944 and 9 February 1945. On 26 December 1944 he was punished under Article of War 104 for cashing four of these.

By his repeated irresponsible and fraudulent conduct the accused has demonstrated himself to be unworthy of retention in the service. I accordingly recommend that the sentence be confirmed and ordered executed.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

Myron C. Cramer

2 Incls
Incl 1 - record of trial
Incl 2 - Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

~~(Sentence confirmed and ordered executed. G.C.M.O.~~

(Sentence confirmed. G.C.M.O. 297, 7 July 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGK - CM 278082

17 APR 1945

UNITED STATES	)	HEADQUARTERS, FOURTH ARMY
v.	)	Trial by G.C.M., convened at Fort Huachuca, Arizona, 27 February 1945 and 1 March 1945. Dismissal, total forfeitures and confinement for five (5) years.
Second Lieutenant ARTHUR O. SPADY (O-1301701), Infantry.	)	

OPINION of the BOARD OF REVIEW
LEON, HEPBURN and MOESE, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion to The Judge Advocate General.

2. The accused was tried upon the following Charges and Specifications:

CHARGE: Violation of the 61st Article of War.

Specifications 1, 4, 8, 11, 14, 17 (Finding of not guilty)

Specification 2: In that Second Lieutenant Arthur O. Spady, Company A, 372d Infantry, did, at Fort Huachuca, Ariz., on or about 11 December 1944, fail to repair at the fixed time to the properly appointed place of assembly for Drill Call.

Specifications 3, 5, 6, 7, 9, 10, 12 and 13 are identical with Specification 2 except as to date and purpose of assembly. These differences were as follows:

Specification	Date	Purpose of Assembly
3	11 Dec 1944	Retreat
5	12 Dec 1944	Drill Call
6	14 Dec 1944	Drill Call
7	14 Dec 1944	Retreat
9	15 Dec 1944	Drill Call
10	16 Dec 1944	Retreat
12	16 Dec 1944	Drill Call
13	15 Dec 1944	Retreat

Specification 15: In that Second Lieutenant Arthur O. Spady, Company A, 372d Infantry, did, without proper leave absent himself from his organization at Fort Huachuca, Ariz., from about 9 January 1945 to about 12 January 1945.

Specification 16: In that Second Lieutenant Arthur O. Spady, Company A, 372d Infantry, did, without proper leave, absent himself from his organization at Fort Huachuca, Ariz., from about 16 January 1945 to about 20 January 1945.

He pleaded not guilty to the Charge and all of its Specifications. He was found not guilty of Specifications 1, 4, 8, 11, 14 and 17, and guilty of Specifications 2, 3, 5, 6, 7, 9, 10, 12, 13, 15 and 16 of the Charge, and of the Charge. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a period of 5 years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence in support of the Specifications of which the accused was found guilty may be summarized as follows: Captain William M. Bridgeford testified that on or about 21 November 1944 accused, a 2nd Lieutenant AUS, was assigned to duty with Company A, 362 Infantry Regiment, stationed at Fort Huachuca, Arizona, of which organization the witness was the commanding officer (R. 16-18, 36). Shortly after accused joined the organization witness appointed him a platoon commander and told him how he "ran" the company. All officers were required to attend drill and retreat each day (R. 32, 45, 46, 49).

A schedule of the duties to be performed by the officers of the company was posted on the bulletin board in the company office. Officers were supposed to read it and initial it (R. 21,33). Accused was told to do so, but whether he did or not the witness could not say (R. 18-190).

During the first few days after the accused joined the organization he was present and performed his duties as expected, but, as time passed, commencing about 4 December 1944, he began to fail to report for his duties (R. 20,23). His absences became so frequent that the witness made notations in his notebook when they occurred. Refreshing his memory therefrom, he stated that the accused was absent from drill formations and Retreat from 13 December to 28 December and was carried "AWOL" on the Morning Report of the company because of his failure "to report or repair at the proper place at the proper time" (R. 28,31,34). When the Morning Report was produced it showed accused AWOL from 13 December until 28 December 1944 (R. 29). During that time the witness saw accused only at sporadic intervals (R. 29). The accused did not attend Drill Call or Retreat on and between those dates (R. 32-34, 45-46, 49, 51).

On 15 December accused was absent until 11:55 a.m. (R. 47), and also on the 16th until about noon when he came into the office, procured his mail, and left within 15 minutes (R. 47).

During the dates referred to, drill formations and Retreat were held on each of those days at the usual place. Accused had no authority to be absent (R. 75).

Captain Bridgeford departed on leave on 8 January 1945 for 18 days. In his absence, Lieutenant Gordon H. Jones, the accuser, was in command. On the evening of 8 January 1945, Lieutenant Jones observed the return of the accused to Fort Huachuca. The accused had on 30 December 1944 left Fort Huachuca as Train Escort to a party of enlisted men going to Camp Bowie, Texas (R. 61-62, 67-68), and returned to Fort Huachuca. During the 18 days commencing 8 January 1945 while Lieutenant Jones was in command, the accused failed to report for any duty. He saw accused twice during that time - once to get his mail, and once when accused sat in the orderly room for about an hour and then left(R. 54, 55, 58, 59).

Over the objection of defense counsel, certified copies of extracts of the company's Morning Report with reference to the accused were introduced in evidence (R. 73-74, Pros. Ex. 3, 4). The entries on the Morning Report on 19 January 1945 showed accused "Dy to AWOL 0001 9 Jan 45 fr his organ"; on 21 January 1945 "AWOL to dy 1430 12 Jan 45 Dy to AWOL fr Co A 0600 16 Jan 45 AWOL to Arrest in qrs 20 Jan 45."

4. On behalf of the accused Lieutenant Jones was recalled as a witness and testified that he himself was present for Reveille every morning during Captain Bridgeford's absence and accused did not "make" Reveille at any time during those 18 days (R. 81). Nor was the accused out in the field with the troops at any time during that period (R. 82). He reiterated that it was during the evening of 8 January 1945 that he saw accused return to Fort Huachuca from Camp Bowie (R. 83-84).

1st Lieutenant Philip C. Randall testified that he was a member of the 372d Regiment and on 9 January 1945 saw the accused in the vicinity of the Regimental Headquarters upon his return from Camp Bowie (R. 90). He also saw him later that day in the 1st Battalion Barracks, but at no time in Company "A" area (R. 91).

The accused elected to remain silent (R. 97).

5. The evidence for the prosecution consisting of the uncontradicted testimony of the commanding officer establishes that the accused, an officer of Company A, 372d Infantry, stationed at Fort Huachuca, Arizona, and required to attend Company Drill Call and Retreat each day, failed to appear at either Drill Call or Retreat on the dates averred in Specifications

2, 3, 5, 6, 7, 9, 10, 12, and 13, namely, 11, 12, 14, 15, and 16 December 1944. The accused offered no defense. The findings of guilty of these Specifications should therefore be sustained. A failure to repair at the fixed time to the properly appointed place on the part of one in military service is a violation of the 61st Article of War. MCM 1928, paragraph 132, page 145:

> "The article [61 A.W.] is designed to cover every case not elsewhere provided for where any person subject to military law is through his own fault not at the place where he is required to be at a time when he should be there * * *"

With reference to the remaining Specifications (15 and 16) of which the accused was found guilty, the acting company commander testified that, commencing on the evening of 8 January 1945 and continuing for a period of 18 days, the accused did not report for duty to nor perform any duties for or with his organization. The Morning Report of the organization certified to by the same officer showed the accused to be absent without leave from his organization for only a part of that time, namely, from 9 January to 12 January 1945, and again from 16 January to 20 January 1945. The entries were not made until 19 January and 21 January 1945, respectively. The accused introduced no evidence in defense or in explanation.

Morning reports are admitted into evidence as exceptions to the hearsay evidence rule and given prima facie probative value by military tribunals. The credence to which they are entitled, and the probative value to be given them, are directly dependent upon the integrity and strictness with which the rules governing their preparation have been compiled by the officer responsible for their preparation. In view of the direct evidence of the accused's absence during the periods charged given by the officer whose duty it was at the time to prepare and certify the morning report, and the absence of any evidence tending to show any error in the entries, the fact that the entries were made 10 days or more after the event took place, without explanation of the cause of delay, should not affect the admissibility of the morning report in evidence (CM 254182).

Under all the circumstances the evidence is convincing that the accused was guilty as alleged and the findings should therefore be sustained.

6. War Department records show the accused to be 32½ years of age. He graduated from high school and attended Howard University for one year. For three years he was employed as a porter in a hospital, and for 2½ years as switchboard operator and clerk in a hotel. On 15 April 1942 he was inducted into the service and on 27 November 1942 upon successful completion of his training in The Infantry School at Fort Benning, Georgia, he was commissioned a 2nd lieutenant, AUS.

7. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed by the court during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 61.

Judge Advocate.

Judge Advocate.

Judge Advocate.

SPJGK-CM 278082 1st Ind

Hq ASF, JAGO, Washington 25, D. C.

TO: The Secretary of War.

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Arthur O. Spady (0-1301701), Infantry.

2. Upon trial by general court-martial accused was found guilty of failing to attend Drill Call and Retreat of his organization (nine specifications), and of being absent without leave from his organization for a period of three (3) days and four (4) days, respectively, in violation of Article of War 61. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a period of five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. I concur in that opinion.

Shortly after accused was assigned to his present organization - an infantry company - he gradually began to fail in attendance upon company formations such as Reveille, Drill Call and Retreat. His company commander remonstrated with him, but in total disregard of his responsibilities, and in disdain of higher authority, accused persisted in the nonperformance of his duties and went absent without leave for two periods of three and four days respectively. This continued course of conduct and his attitude toward military discipline clearly demonstrate that he is unfit to remain an officer. He deserves substantial punishment, but it is felt that five years' confinement is out of proportion to the offense of which he stands convicted.

I recommend that the sentence be confirmed, but that the forfeitures be remitted, that the confinement be reduced to one year, that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement, and that the sentence as thus modified be carried into execution.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

Myron C. Cramer

2 Incls
Record of trial
Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but forfeitures remitted and confinement reduced to one year. G.C.M.O. 251, 19 June 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGQ - CM 278091

UNITED STATES v. Second Lieutenant ROBERT J. ELLIOTT (0-751111), Air Corps.	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Hobbs Army Air Field, Hobbs, New Mexico, on 6 and 7 March 1945. Dismissal, total forfeitures, and confinement for six (6) months.

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OPINION of the BOARD OF REVIEW
ANDREWS, FREDERICK and BIERER, Judge Advocates

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1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 61st Article of War.

Specifications 1 and 2: (Findings of guilty disapproved by the reviewing authority.)

Specification 3: (Finding of not guilty.)

Specification 4: In that Second Lieutenant Robert J. Elliott, Section H, 3017th Army Air Forces Base Unit, did, without proper leave, absent himself from his appointed place of duty at Hobbs Army Air Field, from about 0545 20 November 1944 to about 0830 20 November 1944 and from about 1100 20 November 1944 to about 1230 20 November 1944.

Specification 5: In that Second Lieutenant Robert J. Elliott, Section H, 3017th Army Air Forces Base Unit, did, without proper leave, absent himself from his appointed place of duty at Hobbs Army Air Field, from about 0545 21 November 1944 to about 0830 21 November 1944 and from about 1100 21 November 1944 to about 1230 21 November 1944.

CHARGE II: Violation of the 96th Article of War. (Finding of not guilty.)

Specification: (Finding of not guilty.)

ADDITIONAL CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Robert J. Elliott, Section H, 3017th Army Air Forces Base Unit, did, at Hobbs, New Mexico, on or about 15 November 1944, wrongfully and to the discredit of the military service make and utter a check payable to cash and drawn on the Bank of Douglas, Douglas, Arizona, and by means thereof did obtain cash in the amount of Three Hundred Dollars ($300.00) from the Lea County State Bank, Hobbs, New Mexico, without having a bank balance or credit at the drawee bank sufficient to pay said check.

Specification 2: In that Second Lieutenant Robert J. Elliott, Section H, 3017th Army Air Forces Base Unit, Hobbs Army Air Field, Hobbs, New Mexico, having on or about 8 December 1944, made and uttered a certain check drawn on the Bank of Douglas, Douglas, Arizona, in the amount of Fifty-two dollars and fifty cents ($52.50) payable to the order of the Officers Mess at Hobbs Army Air Field, Hobbs, New Mexico, and having received value therefor, did, thereafter wrongfully fail to maintain a sufficient balance in the drawee bank to pay said check when presented for payment.

Specifications 3, 4, 5, 6 and 7: These are identical with Specification 2 except for the dates, amounts, and payees, which exceptions are, respectively, as follows:

Specification	Date	Amount	Payee
3	15 December 1944	$11.70	H.A.A.F. Exchange at Hobbs Army Air Field, Hobbs, N.M.
4	15 December 1944	$24.70	H.A.A.F. Exchange at Hobbs Army Air Field, Hobbs, N.M.
5	16 December 1944	$20.00	Officers Mess at Hobbs Army Air Field, Hobbs, N.M.
6	17 December 1944	$20.00	Officers Mess at Hobbs Army Air Field, Hobbs, N.M.
7	18 December 1944	$20.00	Officers Mess at Hobbs Army Air Field, Hobbs, N.M.

Specification 8: In that Second Lieutenant Robert J. Elliott, Section H, 3017th Army Air Forces Base Unit, having been restricted to the limits of Hobbs Army Air Field, did, on or about 2 January 1945, break said restriction by going beyond the limits of Hobbs Army Air Field, Hobbs, New Mexico.

A motion to strike Specifications 2 to 7, inclusive, of the Additional Charge on the ground that they do not state an offense and do not apprise the accused of the nature and character of the charges against him was denied. The accused pleaded guilty to Specification 8 of the Additional Charge and not guilty to all other Specifications and the Charges. He was found not guilty of Specification 3, Charge I and of the Specification of Charge II and of Charge II. He was found guilty of all other Specifications and Charges. No evidence of previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for six (6) months. The reviewing authority disapproved the findings of guilty of Specifications 1 and 2, Charge I, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence with regard to those Specifications as to which findings of guilty were not disapproved by the reviewing authority, briefly summarized, is as follows:

At the time of the offenses alleged the accused was a student assigned to undergo training at Hobbs Army Air Field, Hobbs, New Mexico (R. 12, 13).

Specifications 4 and 5, Charge I:

For the prosecution:

It was shown that the accused was assigned to Class 44-H, and was a member of Flight R thereof from 23 September 1944 to 21 November 1944 (R. 13, 19). Regardless of the confusion of the terms "class", "section" and "flight" in the interrogation and the answers, it was established by the testimony of the Director of Training and Operations at Hobbs Field that the students were divided into classes which, in turn, were broken up into lettered flight sections for training purposes (R. 13, 19, 22-24, 29). There was no direct evidence offered to show a change in the accused's class or flight assignment thereafter. However, documents known as delinquency and status reports from Group IV operations officer to the director of flying on 20 November 1944 and 21 November 1944 purported to show the accused absent without leave on said dates from Class I (lettered), Section P. Vigorous objection was made to the introduction of these reports on the ground that they

were merely the eventual compilation of reports received from others and purely hearsay for that reason (R. 26-28). In explanation of the method employed in making the reports it was shown that: (1) when students report at the scheduled time a check of absentees is then made and turned in to the squadron commander; (2) at the close of the scheduled instruction a check is again made to determine whether a student was merely late or absent and this check is likewise turned over to the squadron commander; (3) he, in turn, reports the check to the group operations officer; (4) who then makes the consolidated report to the director of flying (R. 25, 26). Notwithstanding objection the reports were admitted in evidence (R. 28; Pros. Ex. 8 and 9).

Training schedule of Class 44-I, for the period 20 November 1944 through 26 November 1944 was admitted in evidence (R. 24; Pros. Ex. 4). According to this programme students of Flight (or Section) P were scheduled on both 20 and 21 November 1944 to participate in flying from 0545 to 1230.

For the defense:

Having been warned of his rights (R. 56) the accused elected to testify. He admitted that he was attached to Section (Class) H during the entire period in question and that, at first, he was a member of Flight R and later, Flight P, although he could not recall the exact date of the change (R. 71). He further admitted that he knew it was his appointed duty, on both 20 and 21 November 1944, to be at the flight line with Section (Class) H, from about 0545 to 0830 and from about 1100 to about 1230 (R. 73) but that, on both occasions, he had not gone to the flight line because of dental appointments at the hospital (R. 59, 73, 75), and had been in the dental office during most of those mornings, returning to his barracks thereafter (R. 74). He also had a dental appointment for the following day (23 November 1944) (R. 74) but this was in the afternoon because, when he had been asked about his absences on 20 and 21 November and had stated that he had been to the dentist, it was explained to him that dental treatment should not be taken during a flying period and thereafter he never did have any dental appointment during such periods (R. 81). He had signed the "sick book" on 20 November 1944 (R. 75) under the impression that doing so excused him from classes (R. 59, 74). He explained the divisions of time in these Specifications on the ground that, although he had been originally charged with full day absences, the hours were later specified after he had obtained and shown the hospital records and the flight surgeon had advised that sick call "took" approximately two hours (R. 81).

The dental officer at Hobbs Field testified that he treated the accused on both 20 and 21 November 1944 but was unable to recall the length of time required on either occasion or the nature of the treatment given (R. 49, 51, 52). However, appointments usually were after 9 o'clock a.m. (R. 52).

Court witness:

The commandant of student officers testified that written and verbal instructions regarding sick call were given to the students of all new classes when they arrive at the field. These were to the effect that to report on sick call a student is required to sign the sick book which is normally done at 8 o'clock but could be done at any necessary time of day. Upon return from the hospital, the book is again signed before reporting for duty. Should a student be scheduled for any duty prior to sick call he is required, if able to do so, to report for such duty first, and, upon return from the hospital, should report back to duty if found fit to do so (R. 84, 86). However, no provision was made for excusing from classes because of dental appointments (R. 84).

Additional Charge and Specifications:

For the prosecution:

The accused and his wife had a joint account in the Bank of Douglas, Arizona and the wife issued some checks against the account (R. 30; Pros. Ex. 11).

On 15 November 1944 the accused presented to the Lea County State Bank, Hobbs, New Mexico, his check of the same date drawn upon the Bank of Douglas, Douglas, Arizona in the amount of $300.00, payable to the order of "cash" and received the sum of $300.00 therefor (R. 35, 39; Pros. Ex. 18). The check was sent to the drawee bank for collection on the same date but was returned. The teller of the Lea County State Bank testified that, in the latter part of November or early December, she called the accused and asked him what to do about the check and, that he then thought "the money was there" or "should be there" and suggested sending it back again for collection (R. 38, 39). This was done, whereupon, the check was protested and returned (R. 35, 36, 38).

On or about 8 December 1944 the accused presented to the Officers Mess, Hobbs Army Air Field, his check of the same date drawn upon the Bank of Douglas in the amount of $52.50, payable to "Officers Mess". In return therefor he received the sum of $20.00 in cash and with the balance made payment of his account with the Officers Mess for November 1944 in the amount of $32.50 (R. 30, 31; Pros. Ex. 10, 15).

On or about 15 December 1944 two checks signed by the accused and bearing the same date, each drawn upon the Bank of Douglas in the respective sums of $24.70 and $11.70, and each payable to "H.A.A.F. Exchange" were received at the Hobbs Army Air Field Post Exchange in return for merchandise (R. 32, 33; Pros. Ex. 16, 17).

On 16, 17 and 18 December 1944 the accused presented to the Officers Mess, Hobbs Field, three of his checks, respectively, each drawn on the Bank of Douglas in the amount of $20.00, payable to "Officers Mess" and received cash therefor. All of the checks cashed by the Officers Mess were returned unpaid because of insufficient funds (R. 30, 31; Pros. Ex. 10, 12, 13, 14).

Stipulated testimony of the bookkeeper of the Bank of Douglas, Douglas, Arizona established that some time prior to 14 November 1944 and probably in October 1944 she received a telephone call from the accused regarding checks of his which had been returned and at that time he seemed disturbed and asked if his wife had made a deposit and whether the Army had failed to send his monthly allotment check.

On 18 November 1944 the accused's check in the sum of $300.00 dated 15 November 1944 (Pros. Ex. 18) was received at the bank of Douglas and was returned for insufficient funds. On 16 December 1944 his check in the sum of $52.50 dated 8 December 1944 (Pros. Ex. 15) was returned for the same reason. On 23 December 1944 the accused's checks for $24.70 and $11.70, both dated 15 December 1944 (Pros. Ex. 16 and 17) and his checks in the amount of $20.00 each, dated 16, 17 and 18 December 1944, respectively, (Pros. Ex. 12, 13 and 14), were all likewise returned because of insufficient funds.

On 15 November 1944, when the $300.00 check was presented to the Lea County State Bank the balance in the account of the accused in the Bank of Douglas was $208.24; on 8 December 1944, when the check for $52.50 was issued it was $69.19 but by 12 December 1944 had dropped to $49.19; on 15 December 1944, with a balance to his credit of $49.19 the accused issued two checks totalling $36.40 and on 16, 17 and 18 issued three checks totalling $60.00. Meanwhile the balance dropped from $49.19 on 15 December 1944 to $2.46 on 23 December 1944 when the five checks totalling $96.40 were returned because of insufficient funds (R. 30; Pros. Ex. 11).

For the defense:

The accused testified, substantially, as follows:

At the age of 17 years he enlisted in the Army in 1938 after graduation from high school. After serving in the Infantry and Cavalry in the United States he was sent overseas shortly after the attack on Pearl Harbor and returned in May 1942 and became an aviation cadet in October 1942. He was commissioned a second lieutenant in October 1943 (R. 57, 58). After his marriage he and his wife went into debt for the purchase of a piece of property by borrowing $3500 (R. 62, 63) of which they have repaid $2100 during the past year through the medium of an allotment of $150 of his pay monthly. The balance, approximating

$200 monthly, was sent to the Bank of Douglas likewise by allotment.

In April 1944, while she was in Douglas, Arizona with him, his wife became pregnant and he was directed to take her home where she would have better medical and hospital facilities (R. 63). He was obliged to make a loan to accomplish this and because he was having difficulty paying it off the Bank of Douglas agreed to carry it for "a little while longer" (R. 69). The baby was born in August 1944 after difficult labor which imperilled his wife and child. The baby was sick for about six weeks and was not expected to live and the wife was thereafter confined to bed for three months (R. 63).

At about the middle of November 1944 the accused got into financial difficulties. He had borrowed $500.00 by mortgaging his automobile in order to meet bills incurred because of his wife's illness (R. 41, 64) and had become desperate for money to meet bills which had to be paid immediately (R. 67). It was at this time that he conceived the idea of drawing a check for $300.00 upon his account at Douglas, Arizona and obtaining cash for it at the bank in Hobbs, New Mexico in the hope that by the time the check reached Douglas, Arizona, his monthly allotment check, together with other money he was hoping to receive would provide sufficient funds to meet it (R. 63, 67). Instead of keeping the cash so received at Hobbs, New Mexico, he immediately wired $275.00 of it to the Bank of Douglas and he was credited with it on 15 November 1944 (R. 63, 67; Pros. Ex. 11).

One source of revenue with which he intended to supplement this amount was an additional loan which he hoped to effect on his automobile (R. 63, 64, 67, 69). He had previously obtained an attractive offer for the sale of his car but did not accept (R. 63). After cashing the $300 check he made inquiries of the man who held the mortgage on his car for the prior loan (R. 64) and later negotiated with a Mr. Jobe who finally, between 20 and 25 November 1944, agreed to make an additional loan of $500 on the car or buy it outright for $1350.00 (R. 41, 42).

A few days after these negotiations had been started the accused was admitted to the hospital as a patient in quarantine (R. 42, 64) and when released, was restricted to his quarters by the medical authorities. When this restriction expired he was further restricted by his commanding officer on 11 December 1944 because of pending charges which had been filed against him (Charges I and II) (R. 64). Consequently, although he was extremely anxious to effect the loan on his car he was unable to leave his quarters from 27 November 1944 to 11 December 1944 or the limits of Hobbs Field thereafter (R. 65). Nevertheless, he meanwhile attempted to complete the deal with Mr. Jobe through emissaries, and papers were sent back and forth until eventually the mortgage was executed on about 20 December 1944 and Mr. Jobe was ready to loan the money (R. 42, 43; Def. Ex. A). The accused, who was still restricted to the field, kept the papers over the Christmas holidays and then telephoned to Mr. Jobe asking him to come out to camp as the accused had decided

to sell the car instead of taking the loan (R. 43, 44).

Hopeful of finding the man who had made the first and better offer for the purchase of the car, he finally broke his restriction, on 2 January 1945 and made an unsuccessful trip to Lubbock, Texas, after which he also visited Mr. Jobe who promised to come out to camp the next day. When the accused returned to camp he was placed in arrest in quarters by Colonel Garrison because of the breach of restriction, and was denied the use of the telephone. The trial judge advocate did, however, telephone to Mr. Jobe for the accused and advised him that he could have the car at his price (R. 44, 65). When Mr. Jobe appeared at camp to get the car he was prevented from doing so because Colonel Garrison told him he could not take it from the post until after the court-martial trial (R. 45, 47, 65, 70).

When the accused learned of this he went to Colonel Garrison's office where the following took place:

> "A. I heard at that time from an enlisted man - I would rather not bring his name in - that I had two twenty dollar checks come back from the Club. I asked Colonel Garrison about it and he said, yes, he had them, and I asked if I could call the bank and try to arrange to get this straightened up. He told me then, no, that he wanted to hold them for a while. So I told him I'd like to see my car, and asked him if he would release my car. He said, no, he wouldn't release it, and that I couldn't sell it. I went back two or three times to try to get him to let me sell the car, or release it some way. About that time, I knew Captain Hummert, and asked him if he could try to make a phone call to my wife, the bank, my folks, or someone, and that privilege was refused, too. (R. 66)

By about 10 January 1945 the accused managed to get word to his family about his difficulties and his wife and brother came to Hobbs, New Mexico. All of the checks were then paid although the accused had offered to pay them several times previously and before charges were filed but the accused's attorney had instructed the bank that they were not to be paid then (R. 37, 66).

It was shown that since the installation of the Hobbs Army Air Field branch of the Lea County State Bank, between 60 and 100 checks were returned to the bank monthly because of insufficient funds (R. 36) and at the Post Exchange the monthly average of such checks was from two or three to "quite a few" (R. 34); and it was stipulated that there had been no prosecution by court-martial at Hobbs Army Air Field of any officer upon charges of giving checks with insufficient funds (R. 83).

4. Although the prosecution produced only doubtful proof of the accused's absence from prescribed places of duty on 20 and 21 November 1944 the accused, by his admissions at the trial, furnished conclusive evidence that he knew it was his duty to be on the flying line at his station during the morning hours set forth in the Specifications and that he was absent during the periods alleged. It is, therefore, unnecessary to discuss the competency of the documentary evidence with which the prosecution sought to establish the prescribed duties and the failure to repair to the place where they were to be performed except to say that the action of the court and the reviewing authority in acquitting the accused of all other similar offenses was proper because of the dubious propriety of admitting the attendance reports and the lack of other competent evidence to establish the offenses charged.

That the accused may not have fully understood and properly interpreted the rules, regulations and policies with regard to sick call so that he ignorantly believed that an appointment for dental treatment was of equal importance with hospital visitations for other physical ailments and would justify his absence from duties cannot be offered as a defense but only in mitigation or extenuation. Article of War 61, under which his failures to repair were charged, is designed to cover every case not elsewhere provided for where any person subject to military law is, through his own fault, not at the place where he is required to be at the time when he should be there (par. 132, MCM 1928). In this case, the accused offered in explanation of his admitted defaults matter which shows that his absence from duties was due to his own fault in not complying with prescribed rules and regulations and, therefore, constitutes no defense.

It is apparent from a consideration of all the evidence offered in support of the Specifications under the Additional Charge that, although the accused became the innocent victim of straightened financial circumstances because of the pregnancy of his wife and the protracted illness of both wife and child subsequent to the birth of the child, the offenses arising out of his attempt to meet steadily accruing obligations by the issuance of checks without maintaining sufficient funds to meet payment thereof resulted from his unwise and wrongful determination to gamble upon the happening of an uncertain chain of future events.

It is quite likely that, if he had been able to dispose of his automobile, or procure a loan upon its security, between the time when he issued a check for $300 upon the Bank of Douglas and received cash therefor from the bank in Hobbs, New Mexico, and the date of its clearance at Douglas, Arizona, and if this potential sum which was estimated to be in the neighborhood of $500 or $600 had been procured

and promptly transmitted to the Bank of Douglas and added to the proceeds of his next monthly allotment of pay to the Bank of Douglas and the $275 already forwarded by the accused out of the $300 obtained at the bank in Hobbs, New Mexico, the aggregate amount would probably have been adequate to meet all outstanding checks drawn upon his account in said bank at or about 1 December 1944. But, unforeseen circumstances intervened to prevent the scheme from succeeding as planned.

Within a few days after the accused had commenced negotiations with a civilian in Hobbs, New Mexico for a loan on his automobile, he was taken ill and was confined to the hospital, in quarantine until 3 or 4 December 1944 when he was released but confined to his quarters by the medical authorities. While he was still so confined he was placed in arrest in quarters by his commanding officer because of the filing of the original charges against him, of most of which he was subsequently acquitted. Thus the accused was prevented, by restraint imposed upon him, from leaving his station and effecting the loan he had contemplated. It is evident that his expenses continued and his indebtedness accumulated and it was inevitable that the checks drawn upon the account which he failed to supplement could not be paid out of the insufficient funds which resulted from day to day depletion unless he could raise funds as he had planned and still intended to do.

To make matters worse, however, when the accused finally managed, through intermediaries, to complete the measures necessary to effect a loan on his car, the commanding officer, who had ordered his restriction, forbade the removal of the car from the post until after the court trial and thus effectively terminated the accused's efforts to discharge his obligations in this manner.

However, the accused's wife and brother came to his financial rescue and restitution was made upon all the checks before trial. In fact payment of the $300 check was tendered to the bank in Hobbs, New Mexico early in January 1945 and before the additional charges were filed but was not accepted on the advice of counsel for the accused.

This rather lengthy resume of the state of affairs which involved the accused in his financial entanglement is set forth to show the mitigating circumstances, not to justify the conduct of the accused; for whatever may have been his original good intentions, they were based solely upon contingencies with which he had no right to gamble. He wrongfully obtained the $300 in the first instance and continued, in the face of mounting difficulties, to play with chance. Whoever undertakes to issue negotiable instruments with such negligent disregard of his ability to meet the payment thereof as is evident herein is guilty of the offense with which the accused stood charged and of which he was properly convicted (par. 453 (22) Dig. Ops. JAG 1912-40; 3 Bull. JAG 290).

Neither the fact that the checks have been paid nor that this appears to be the first of many similar cases at the accused's station which was prosecuted by court-martial constitutes a defense. The fact that members of his family did make belated restitution demonstrates that the accused might have availed himself of similar aid in the maintenance of his bank account and thus avoided the non-payment of his checks.

5. Consideration has been given to a letter from the Commanding General, Headquarters, AAFWFTC, Santa Ana, California, to The Judge Advocate General, inclosing a letter from the accused with nine inclosures and 13 other letters in behalf of the accused received at said headquarters.

6. Records of the War Department disclose that the accused was born in Mason, Illinois, is 23 years and 9 months of age, married and the father of one child. After graduation from high school he assisted his father in farming but from 1940 to 1941 when he was called into service, he was an independent salesman earning $250 a month. In 1936, 1937 and 1938 he served during the summers in the Citizens Military Training Corps. From 5 August 1938 to 25 November 1940 he served in the Enlisted Reserve Corps of the Sixth Corps Area. From 26 November 1940 to 8 October 1942 he was a member of Headquarters 144th Infantry Regiment. He became an aviation cadet on 8 October 1942 and after receiving the prescribed courses of training was commissioned a second lieutenant, Army of the United States at Douglas Army Air Field, Douglas, Arizona, on 28 July 1943, and was thereupon assigned to active duty.

7. The court was legally constituted and had jurisdiction of the accused and the offenses charged. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings, as approved by the reviewing authority, and the sentence and to warrant confirmation of the sentence. The sentence imposed is authorized upon conviction of a violation of either Article of War 61 or Article of War 96.

Esther R. Andrews, Judge Advocate.

Herbert K. Frederick, Judge Advocate.

On Leave, Judge Advocate.

SPJGQ-CM 278091 1st Ind

Hq ASF, JAGO, Washington 25, D.C. JUN 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Robert J. Elliott (O-751111), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to Specification 8, Additional Charge (breach of restriction) in violation of Article of War 96. He was found not guilty of Specification 3, Charge I and Charge II and the Specification thereof. He was found guilty of Specifications 1, 2, 4 and 5, Charge I (four instances of absence from appointed places of duty) and of Charge I, in violation of Article of War 61, of Specifications 1 to 7, inclusive (seven instances of failure to maintain sufficient funds in bank to insure payment of issued checks), and of Specification 8, Additional Charge (above), and of the Additional Charge, in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for six (6) months. The reviewing authority disapproved the findings of guilty of Specifications 1 and 2, Charge I, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings, as approved by the reviewing authority, and to support the sentence and to warrant confirmation thereof. I concur in that opinion.

In April 1944, because of the advanced pregnancy of his wife and lack of facilities at Douglas, Arizona, his station where she had been living with him, this officer was obliged to send her home. To meet the incidental expenses involved he was required to borrow money. The child was born in August 1944 after difficult labor which imperilled the wife and child. The baby was sick for six weeks and was not expected to live and the wife was thereafter confined to bed for three months. In the middle of November 1944 he became desperate because of mounting expenses. He had an automobile upon which he had already borrowed $500 and hoped to sell it or make an additional loan upon its security. With this in view he conceived the idea of anticipating the receipt of funds from such loan by drawing a check for $300 upon his bank account in Douglas, Arizona and

cashing it at the bank in Hobbs, New Mexico. He did so, but of the $300 which he received from the bank in Hobbs, New Mexico, he immediately transmitted $275.00 to the bank in Douglas, Arizona upon which the check was drawn. This he did, hoping that by the time the check cleared, the $275 thus transmitted, added to the sum of about $200 which he forwarded to his bank monthly by allotment, and such funds as he would obtain by loan upon or sale of his car, would be adequate to meet all checks drawn upon the account in the Douglas bank. Immediately after cashing the $300 check he entered into negotiations with a civilian who agreed to lend $500 on the car or buy it outright for $1350. However, before the accused could complete the deal he was confined to the hospital in quarantine and when released therefrom was restricted to his quarters by the medical authorities. When this restriction expired he was further restricted to his quarters by his commanding officer on 11 December 1944 because of the filing of charges against him, of most of which he has now been acquitted. Nevertheless, he carried on negotiations for raising funds through emissaries, and around the Christmas holidays was prepared to complete the transaction but was unable to do so because the commanding officer refused to permit the car to be taken from the post until after the court-martial trial. Thus the accused was continually prevented, through others, from obtaining funds with which to replenish this diminishing bank account. He was then confronted with the Additional Charge and Specifications alleging failure to maintain sufficient funds in bank. Eventually, and before trial, he was able to get word to his family about this predicament and his wife and brother came to Hobbs and paid all the outstanding checks. The breach of restriction arose out of his leaving camp on one occasion for the sole purpose of going into town to effect the completion of the loan contemplated. The two absences from appointed places of duty in November 1944 came about because of his misunderstanding of the rules and regulations regarding dental appointments. He was under the erroneous impression that dental treatment was of equal grade with other treatments for physical ailments on sick call and that for such purpose he was excused from duty.

This officer's civilian and military record appear to be above reproach except for these incidents. He and his wife had purchased a home for $3500 and he had already paid off $2100 of this debt during the past year. Although his conduct, under difficult and unforeseen circumstances, cannot be condoned, there are strongly mitigating circumstances. His dependence upon chance in the matter of bolstering his bank account to meet checks already drawn upon funds he ought to have known were insufficient was wrongful but involved no moral turpitude nor are the military offenses of a grave character. Under all of the circumstances the conduct of the accused neither merits nor requires either dismissal or confinement. I recommend that the sentence be confirmed but that it be commuted

to a reprimand and that, as thus modified, the sentence be carried into execution.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

2 Incls
1 Rec of Trial
2 Form of Action

(Sentence confirmed but commuted to a reprimand. G.C.M.O. 321, 9 July 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGH-CM 278114

UNITED STATES v. General Prisoner SAMUEL J. STUBBS.	INFANTRY REPLACEMENT TRAINING CENTER Trial by G.C.M., convened at Camp Roberts, California, 16 March 1945. Dishonorable discharge and confinement for thirty (30) years. Penitentiary.

REVIEW by the BOARD OF REVIEW
TAPPY, GAMBRELL and TREVETHAN, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the above-named general prisoner.

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 58th Article of War

Specification: In that General Prisoner Samuel J. Stubbs, Camp Roberts, California, did at Camp Roberts, California, on or about 16 October 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Redwood City, California, on or about 13 February 1945 by civilian authorities and returned to military control at Redwood City, California on or about 21 February 1945.

CHARGE II: Violation of the 69th Article of War

Specification: In that General Prisoner Samuel J. Stubbs, * * *, having been duly placed in confinement in the Camp Stockade, Camp Roberts, California, on or about 13 September 1944 did at Camp Roberts, California, on or about 16 October 1944 escape from said confinement before he was set at liberty by proper authority.

CHARGE III: Violation of the 96th Article of War

Specification 1: In that General Prisoner Samuel J. Stubbs, * * *, did at Camp Roberts, California, on or about

16 October 1944, wrongfully take and use without consent of the owner, a certain automobile, to wit: a 1936 Buick Sedan Automobile, California License No. 1M6627 (1944) Motor No. 43057921, value more than $50.00, the property of T/4 Adair A. Graham, 39 153 864, Co. B, 78th Infantry Training Battalion, Camp Roberts, California.

Specification 2: In that General Prisoner Samuel J. Stubbs, * * *, did at Coalinga, California, on or about 16 October 1944, wrongfully take and use without consent of the owner, a certain automobile, to wit: a 1939 Plymouth Coupe Automobile, California License No. 46U774, Motor No. P8-178585, value more than $50.00, the property of C. A. and N. A. Lynch.

CHARGE IV: Violation of the 93d Article of War

Specification 1: In that General Prisoner Samuel J. Stubbs, * * *, did at Coalinga, California, on or about 16 October 1944, unlawfully enter the Service Station of C. W. Peterson, P. O. Box 74, Oil Fields, Coalinga, California, with intent to commit a criminal offense therein, to wit: larceny.

Specification 2: (Finding of guilty disapproved by reviewing authority).

Specification 3: In that General Prisoner Samuel J. Stubbs, * * *, did at Redwood City, California, on or about 12 February 1945, unlawfully enter the shop of the Broadway Cleaners, 2730 Broadway, Redwood City, California, Ed. Pollock, owner, with intent to commit a criminal offense therein, to wit: larceny.

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of any previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay or allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority disapproved the finding of guilty of Specification 2 of Charge IV, approved the sentence, reduced the period of confinement to thirty years, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. On 13 September 1944 accused was confined at the Camp Stockade, Camp Roberts, California, as a general prisoner pursuant to a sentence by

general court-martial which was awaiting approval (R. 9). On 16 October 1944 accused and another prisoner, Van Zant, effected their escape by running from the breakfast line to a secluded section of the stockade and cutting the strands of a wire fence surrounding the stockade with pliers previously procured by accused for that purpose (R. 8, 9, 13; Pros. Exs. 1, 6). The two prisoners hid under a Post Exchange until it was dark. Emerging from their hiding place they located a 1936 Buick sedan on the post, bearing California license number 1 M 6627 and being the property of Technician Fourth Grade Adair A. Graham, which Van Zant drove away without Graham's permission (R. 10, 13; Pros. Ex. 6). It was stipulated by and between the prosecution, defense and the accused that this automobile was worth more than $50 (R. 11). The pair abandoned this car at Coalinga, California, when it ran out of gas and appropriated a 1939 Plymouth coupe, California license number 46 U 774, Motor No. P-8-178585, without the consent of W. A. Lynch, the owner (R. 11, 13; Pros. Exs. 2, 6). It was stipulated by and between the prosecution, the defense and the accused that this automobile was worth more than $50 (R. 11).

About ten miles from Coalinga accused broke into a service station owned by C. W. Peterson, P.O. Box 74, Oil Fields, California, and stole a .32 Colt automatic pistol together with a clip containing four or five rounds of ammunition and a shoulder holster, gas ration stamps calling for 1800 gallons of gasoline, $30 in cash, and a pair of field glasses (R. 12, 13; Pros. Exs. 3, 6). After this they drove to Fresno, California, where accused purchased a pair of pants and a shirt. A quarrel developed between the two when they reached Bakersfield and they separated, Van Zant taking the car and accused proceeding to San Francisco by bus. In San Francisco for $15 accused purchased a Selective Service Card which he had filled out in the name of "Stanley J. Slater" with a classification of 1-C, the classification for a discharged soldier. Accused signed this card as Stanley J. Slater. He then went to his father-in-law's ranch at San Jose, California, where with the exception of one week he worked until 8 February 1945, when he departed for San Francisco (R. 13; Pros. Ex. 6). On 12 February 1945 he was in Redwood City, California. Here he broke into a store known as The Broadway Cleaners owned jointly by Mr. and Mrs. Ed Pollock and stole 35 cents (R. 12, 13; Pros. Exs. 5, 6). The next day he was arrested while sleeping in a hotel lobby in Redwood when a policeman doubted the authenticity of his draft card. At the time he was dressed in civilian clothes and was wearing a lapel button signifying that he was a discharged veteran which he had purchased in San Jose on 19 October 1944 (R. 13; Pros. Ex. 6).

4. After the defense counsel stated that accused had been advised of his rights and thoroughly understood them, accused elected to remain silent.

5. a. The Specification of Charge II:

This Specification alleges that accused escaped from confinement at Camp Roberts, California, on 16 October 1944. The evidence shows that accused, a general prisoner, was placed in confinement in the Camp Stockade on 13 September 1944 under a general court-martial sentence which was awaiting approval. It further shows that accused and another prisoner escaped from the stockade by cutting a wire fence surrounding it. The record, therefore, amply supports the findings of guilty of this Specification and the Charge.

b. The Specification of Charge I:

This Specification alleges that accused deserted the service of the United States on 16 October 1944 and that he remained absent in desertion until apprehended on 13 February 1945 by civilian authorities and returned to military control on or about 21 February 1945. It is undisputed that accused was absent without leave. His escape from confinement, his purchase of civilian clothes which he thereafter donned, his purchase of a spurious Selective Service Card, his employment, the length of his absence and the fact that it was terminated by apprehension, afford abundant basis for the inference that he intended to remain away permanently. The record amply sustains the findings of guilty of this Specification and the Charge.

c. Specification 1 of Charge III:

This Specification alleges that accused on 16 October 1944 wrongfully took and used a 1936 Buick sedan, the property of Technician Fourth Grade Adair A. Graham, of a value of more than $50. The evidence reveals that accused and his cohort, Van Zant, took this car which was stipulated to be worth more than $50, without Graham's permission, and abandoned it when they ran out of gas. Inasmuch as accused was present and participated in the taking and using and was therefore a principal, his contention that he cannot be guilty under this Specification because Van Zant actually drove the car is without merit. The record fully sustains the finding of guilty of the Specification.

d. Specification 2 of Charge III:

This Specification alleges that accused on 16 October 1944 wrongfully took and used a 1939 Plymouth coupe, of a value of more than $50, without the consent of the owners, C. A. and W. A. Lynch. While the evidence establishes the taking and using by accused of the car on the date alleged without the permission of the owner, it fails to bear out the allegation that C. A. Lynch owned the automobile. The only evidence of ownership is contained in the deposition of W. A. Lynch who states, "I purchased this automobile from my father C. A. Lynch and am still paying for it in monthly installments." Presumably title to the car passed on the purchase and if so, the question arises whether there is a fatal variance between the allegation and the proof.

"The rule accepted now by practically all courts is that a variance in criminal law is not now regarded as material unless it is of such a substantive character as to mislead the accused in preparing his defense, or is likely to place him in a second jeopardy for the same offense. Hence, the tests of a fatal variance are: Was defendant misled in preparing his defense? Will defendant be protected against a future proceeding involving the same charge?" (2 Wharton's Criminal Evidence, sec. 1028).

Applying these tests to this case it seems clear that the variance was immaterial. The Specification sets out the year, the make, the license and motor number of the car and the date of the commission of the offense. Sufficient information was thus furnished accused to apprise him fully of the offense with which he was charged and it is little less than fantastic to suggest that a misdescription of the state of the title of the car hampered accused in preparing his defense. For the same reason we are unable to see how accused would be prejudiced in establishing a plea of prior jeopardy, if occasion arose. The proper way to support such a plea is to introduce a copy of the court-martial order or a copy of the record of trial (MCM, 1928, par. 68) and in either event accused in this case would be fully protected due to the particularity with which the offense is described. Even if accused were forced to rely on oral testimony to establish his plea of prior jeopardy the error in describing the ownership of the car could scarcely make his task more difficult than if it had been stated correctly. Our conclusion that this variance between the allegations and the proof is not fatal is in accord with the opinion expressed by The Judge Advocate General in CM 201485, Darr, 5 B.R. 119 at page 152. The record is legally sufficient to support the findings of guilty of this Specification.

e. Specifications 1 and 3 of Charge IV:

These Specifications charge accused with housebreaking. The first alleges that on 16 October 1944 he unlawfully entered the service station of C. W. Peterson with intent to commit larceny therein. The second Specification alleges that on 12 February 1945 he unlawfully entered the shop of The Broadway Cleaners, owned by Ed Pollock with intent to commit larceny therein. The evidence establishes in each case that on the date alleged accused forced his way into the building alleged without proper authority and committed larceny therein. From the fact that larceny was committed the court was justified in concluding that the entry was made with that "intent." In the second of these Specifications it is alleged that accused unlawfully entered the shop of The Broadway Cleaners owned by Ed Pollock while the proof showed that this shop was owned jointly by Mr. and Mrs. Ed Pollock. This is the converse of the situation presented in paragraph 5d of this opinion.

The test to be applied has been recited above in that paragraph. This Specification sets out the date of the offense, the trade name of the shop, its address, and the name of one of the owners. Accordingly, despite the erroneous description of ownership, there is a sufficiently meticulous statement of the offense charged to enable accused to prepare his defense and to establish a plea of prior jeopardy. That such a variance is not a fatal defect is recognized by civil authority (42 Corpus Juris Secundum, sec. 267 and cases cited; see also 9 Am. Jur. sec. 48).

6. The prosecution introduced, without objection, a statement, signed and sworn to by accused, which amounted to a confession of all offenses with which he was charged except desertion. This confession was made to a military superior after accused was advised of his rights under Article of War 24. While it would have been better if the circumstances surrounding the making of this statement were more fully developed, particularly on cross-examination, we cannot say that the finding that it was voluntarily made, a finding implicit in the ruling admitting it into evidence, was unwarranted. The corpus delicti of each offense to which the accused confessed was sufficiently established by other evidence.

7. The charge sheet shows that accused is 23 years of age and was inducted on 28 June 1943 at Philadelphia, Pennsylvania. He has had no prior service.

8. The court was legally constituted and had jurisdiction of the accused and the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority. Housebreaking and taking and using an automobile without the consent of the owner are offenses of a civil nature, punishable by penitentiary confinement for more than one year by the law of the District of Columbia (22 D.C. Code 1801, 2204). Accordingly, under the provisions of Article of War 42 accused's entire sentence of confinement may be executed in a penitentiary.

Thomas M. Tabby, Judge Advocate

William H. Gramberell, Judge Advocate

Robert E. Trevethan, Judge Advocate

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGH-CM 278122 9 APR 1945

UNITED STATES v. Second Lieutenant WILLIAM J. BERG (0-780839), Air Corps.	ARMY AIR FORCES WESTERN TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at Lowry Field, Denver, Colorado, 20 March 1945. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
TAPPY, GAMBRELL and TREVETHAN, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 61st Article of War

Specification 1: In that Second Lieutenant William J. Berg, Air Corps Unassigned, attached Squadron T, 3705th AAF Base Unit (Technical School), did, without proper leave, absent himself from Flight Engineers School at Lowry Field, Colorado from about 26 February 1945 to about 10 March 1945.

Specification 2: In that Second Lieutenant William J. Berg, * * *, did, without proper leave, absent himself from Flight Engineers School at Lowry Field, Colorado from about 1800 26 January 1945 to about 2400 26 January 1945.

Specification 3: In that Second Lieutenant William J. Berg, * * *, did, without proper leave, absent himself from Flight Engineers School at Lowry Field, Colorado from about 1800 31 January 1945 to about 2400 31 January 1945.

Specification 4: In that Second Lieutenant William J. Berg, * * *, did, without proper leave, absent himself from

Flight Engineers School at Lowry Field, Colorado from about 0600 3 February 1945 to about 1200 3 February 1945.

Specification 5: In that Second Lieutenant William J. Berg, * * *, did, without proper leave, absent himself from Flight Engineers School at Lowry Field, Colorado from about 0600 4 February 1945 to about 1200 4 February 1945.

Specification 6: In that Second Lieutenant William J. Berg, * * *, did, without proper leave, absent himself from Flight Engineers School at Lowry Field, Colorado from about 8 February 1945 to about 20 February 1945.

He pleaded guilty to and was found guilty of the Charge and each Specification thereof. No evidence of any previous conviction was introduced. He was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The only evidence introduced by the prosecution consisted of a stipulation between the prosecution, defense counsel and accused to the effect that acoused made a pre-trial statement to the investigating officer, Lieutenant Colonel Hawley C. Kerr, following an explanation of his rights and that the statement was as follows:

"My name is William J. Berg, 2nd Lieutenant, Air Corps Unassigned, Attached Squadron T, 3705th Army Air Forces Base Unit (Technical School) Lowry Field, Denver, Colorado. I have been stationed at Lowry Field the past month or so under orders assigning me to duty as a student officer in the Flight Engineers School. I admit that I was absent from Flight Engineers School on the 26th and 31st of January 1945 and again on the 3rd and 4th of February 1945. The reason why I missed school on the first above mentioned date was that I was attending a picture show in the City of Denver and forgot the time and arrived at school forty minutes late. On the remaining dates above mentioned I was ill and did not feel capable of attending school, although I did not have a medical excuse to be absent from my duties.

"I further admit that I have not attended Flight Engineers School since about 25 February 1945 until the present time. I have no excuse for this absence except to say that I was discouraged with the School and with the manner in which it was being operated. I had not been eliminated from the School or washed back or placed in an AFI status. I just quit going because I was discouraged. I feel that I can be of much more value to the

Army if I were assigned to duty at some other station than Lowry Field and were placed on some duty other than that of student officer in the Flight Engineers School.

"I was interviewed by Lt. Col. Kerr approximately ten days or so ago in connection with my absences on 26 and 31 January and on 3 and 4 February 1945 at which time Col. Kerr advised me that my absences would be reported to the Commanding Officer of Lowry Field for such disciplinary action as he might deem appropriate. In absenting myself from FES since 26 February 1945 I was aware that I would probably receive some disciplinary action for my prior absences.

"Before making the above and foregoing statement I was informed by Lt. Col. Hawley C. Kerr that court-martial charges were being filed against me for the aforementioned absences from FES; that he was investigating those absences. At that time he informed me of my rights under the 24th Article of War, advising me that it was my right to remain silent or refuse to answer any questions, the answer to which would tend to incriminate me. He also warned me that such statements as I might freely and voluntarily make to him might be used against me in a court-martial trial for said offenses. With this advice and warning in mind I freely and voluntarily made the above and foregoing statement which I have read and found to be true and correct.

/s/ William J. Berg
/t/ WILLIAM J. BERG
2d Lt., A. C.

SUPPLEMENTAL STATEMENT OF LT. WILLIAM J. BERG

The report that I was absent from FES for the period from about 8 February to about 20 February 1945, as alleged in specification 6 of the Charge, is correct. I have no excuse to offer for my absence during that period." (Pros. Ex. A)

4. The defense introduced no evidence and the accused, after having his rights fully explained, elected to remain silent.

5. The accused's plea of guilty together with his statement made to the investigating officer clearly establishes that accused was absent without leave from 1800, 26 January 1945 to 2400, 26 January 1945; from 1800, 31 January 1945 to 2400, 31 January 1945; from 0600, 3 February 1945 to 1200, 3 February 1945; from 0600, 4 February 1945 to 1200, 4 February 1945; from 8 February 1945 to 20 February 1945 and from 26 February 1945 to 10 March 1945 as alleged. The findings of guilty of the Charge and its six Specifications are, accordingly, fully sustained by the record.

6. War Department records show that accused is 20 years of age and single. He is a high school graduate and was pursuing a course in liberal arts at the University of Minnesota when he enlisted in the Air Forces 25 February 1943. On 23 March 1943 he was enrolled as an Air Corps cadet and after completing the prescribed course of pilot training at Luke Field, Phoenix, Arizona, was appointed a second lieutenant, Army of the United States, on 27 June 1944, and ordered to active duty the same date.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 61.

Thomas N. Tally, Judge Advocate

William H. Gaunbrell, Judge Advocate

Robert C. Trevethan, Judge Advocate

SPJGH-CM 278122 1st Ind

Hq ASF, JAGO, Washington 25, D. C.

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant William J. Berg (0-780839), Air Corps.

1. Upon trial by general court-martial this officer pleaded guilty to and was found guilty of absence without leave on six occasions, in violation of Article of War 61. He was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I concur in that opinion. While accused was a student at the Flight Engineers School, Lowry Field, Colorado, he absented himself without leave for periods of six hours each on 26 January, 31 January, 3 February and 4 February 1945; for a period of 12 days, from 8 February to 20 February 1945; and for a period of 12 days from 26 February to 10 March 1945. Information contained in a letter from accused's station dated 30 March 1945 discloses that the accused filed his voucher for flying pay for the month of February and was paid his flying pay for the month of February when, as a matter of fact, he did not fly during that month. He has not paid the money back.

I recommend that the sentence be confirmed but that the forfeitures be remitted and that as thus modified the sentence be carried into execution.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should such recommendation meet with your approval.

Myron C. Cramer

2 Incls
1. Record of trial
2. Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but forfeitures remitted. G.C.M.O. 212, 13 June 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGK - CM 278123

6 APR 1945

UNITED STATES	)	ARMY AIR FORCES WESTERN TECHNICAL TRAINING COMMAND
v.	)	
Second Lieutenant ROBERT C. LOWES (O-824666), Air Corps.	)	Trial by G.C.M., convened at Lowry Field, Denver, Colorado, 20 March 1945. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
LYON, HEPBURN and MOYSE, Judge Advocates.

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1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 61st Article of War.

Specification 1: In that 2nd Lieutenant Robert C. Lowes, Air Corps Unassigned, Attached Squadron T, 3705th Army Air Forces Base Unit (Technical School), did, without proper leave absent himself from Flight Engineers School, Lowry Field, Colorado, from about 23 January 1945 to about 3 March 1945.

Specification 2: In that 2nd Lieutenant Robert C. Lowes, * * *, did, without proper leave absent himself from Flight Engineers School, Lowry Field, Colorado, from about 7 March 1945 to about 13 March 1945.

He pleaded guilty to and was found guilty of the Charge and both of its Specifications. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution.

The only evidence introduced by the prosecution in support of accused's pleas of guilty was a pre-trial statement made by accused to the investigating officer. As a preliminary to the introduction of this statement in evidence, it was stipulated that if the investigating officer were

present at the trial he would testify that accused made and signed the statement voluntarily, after having been first warned and advised of his rights under the 24th Article of War. The statement was introduced without objection and is, in pertinent part, as follows:

"My name is Robert C. Lowes, 2d Lt., Air Corps, unassigned, attached Sq. T, 3705 AAF Base Unit, Lowry Field, Colorado.

"I came to Lowry Field about 7 December 1944 under orders to attend the Flight Engineer School as a student officer. I was commissioned as a second lieutenant and received my pilot's wings on 8 February 1944. I now have ratings as a single and twin engine pilot.

"I admit that during the periods from about 23 January 1945 to about 3 March 1945 and from about 7 March until the present time (13 March 1945) I was absent from said Flight Engineer School. I do not have any valid reasons for these absences. My only reason is that I am not interested in said school and that I do not wish to become a flight engineer. I would rather be an infantry officer than be a flight engineer.

"On about 6 March 1945, I went to Lt. Col. Schumacher, my immediate commanding officer and told him that I had been absent from school for some time; that I realized that I was in the wrong; and that I desired to re-enter said school. After this conversation with Lt. Col. Schumacher, I was re-entered in said school and attended classes for about two days, after which I again absented myself from further attendance at said school. On this 13th day of March I received notice through the mail to report to Lt. Col. Schumacher and immediately upon receipt of said notice, I reported to him. I had not checked for my mail for several days which accounts for my failure to sooner receive this notice.

"With the possible exception of this last week, I was on the post at Lowry Field at least once every day during the time that I was absent from flight engineering school. My wife has been in Denver for about two months and I have spent considerable time with her. I have no authority to live off of the post.

"I have not been eliminated from flight engineering school, nor have I been advised that I had been placed in the status of AFI. I have successfully passed each of the courses that I have taken in said school." (R. 6, Ex. A.)

4. <u>For the defense.</u>

Upon being advised of his right to testify under oath, to make an unsworn statement, or to remain silent, the accused elected to remain silent. He offered no evidence.

5. The effect of his pleas of guilty was fully explained to accused by the president of the court, after which accused reaffirmed said pleas.

By his pleas of guilty, the accused judicially confessed the facts set forth in the specifications. He did not thereafter offer any evidence inconsistent with such pleas of guilty, and they, together with his pre-trial statement, are legally sufficient to support the findings. (CM 236359, Tindell, 22 B.R. 390; CM 226247, Leavitt, 16 B.R. 51; CM 237522, Dugan, 24 B.R. 31.)

6. War Department records disclose that this officer is 21 years of age and single. He is a high school graduate. Before entering the military service, he was employed by General Motors in one of its branches that was engaged in producing B-25s, as an assembly list writer. He entered the service as an enlisted man in January 1943 and served in this capacity and as an aviation cadet until 8 December 1944, at which time he was commissioned a second lieutenant, Air Corps, Army of the United States.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 61.

Irving G. Gow, Judge Advocate.

Carlos Stern, Judge Advocate.

Herman Meyer, Judge Advocate.

SPJGK - CM 278123 1st Ind.

10 APR 1945

Hq ASF, JAGO, Washington, 25, D.C.

To: The Secretary of War

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Robert C. Lowes (0-824666), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. The record shows willful absence without leave upon two occasions, one of which was for one month and twelve days. I recommend that the sentence be confirmed but that the forfeitures be remitted and that the sentence as thus modified be carried into execution.

3. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

3 Incls
1. Record of trial
2. Draft ltr for sig Sec of War
3. Form of action

(Sentence confirmed but forfeitures remitted. G.C.M.O.194, 9 June 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGQ - CM 278124

UNITED STATES	)	ARMY AIR FORCES WESTERN TECHNICAL TRAINING COMMAND
v.	)	Trial by G.C.M., convened at Lowry Field, Colorado, 16 March 1945. Dismissal and total forfeitures.
Second Lieutenant CLARENCE E. IMM (0-784456), Air Corps.	)	

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OPINION of the BOARD OF REVIEW
ANDREWS, FREDERICK and BIERER, Judge Advocates

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1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Clarence E. Imm, Air Corps Unassigned, Attached Squadron T, 3705th Army Air Forces Base Unit (Technical School), did, without proper leave, absent himself from Flight Engineers School at Lowry Field, Colorado, from about 25 January 1945, to about 2 March 1945.

He pleaded guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The only evidence for the prosecution consisted of a stipulation between accused, his counsel and the prosecution, accepted by the court, that if the investigating officer were present in court he would testify that he interviewed the accused and advised accused of his rights under Article of War 24, and that accused thereupon made the following statement:

SPJGK - CM 278123 1st Ind.

10 APR 1945

Hq ASF, JAGO, Washington, 25, D.C.

To: The Secretary of War

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Robert C. Lowes (0-824666), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. The record shows willful absence without leave upon two occasions, one of which was for one month and twelve days. I recommend that the sentence be confirmed but that the forfeitures be remitted and that the sentence as thus modified be carried into execution.

3. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

3 Incls
1. Record of trial
2. Draft ltr for sig Sec of War
3. Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but forfeitures remitted. G.C.M.O.194, 9 June 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGQ - CM 278124

UNITED STATES	)	ARMY AIR FORCES WESTERN TECHNICAL TRAINING COMMAND
v.	)	
Second Lieutenant CLARENCE E. IMM (0-784456), Air Corps.	)	Trial by G.C.M., convened at Lowry Field, Colorado, 16 March 1945. Dismissal and total forfeitures.

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OPINION of the BOARD OF REVIEW
ANDREWS, FREDERICK and BIERER, Judge Advocates

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1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Clarence E. Imm, Air Corps Unassigned, Attached Squadron T, 3705th Army Air Forces Base Unit (Technical School), did, without proper leave, absent himself from Flight Engineers School at Lowry Field, Colorado, from about 25 January 1945, to about 2 March 1945.

He pleaded guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The only evidence for the prosecution consisted of a stipulation between accused, his counsel and the prosecution, accepted by the court, that if the investigating officer were present in court he would testify that he interviewed the accused and advised accused of his rights under Article of War 24, and that accused thereupon made the following statement:

"My name is Clarence E. Imm, Second Lieutenant, Air Corps Unassigned, Attached Squadron T, 3705th Army Air Forces Base Unit, Lowry Field.

"My age is twenty six years. I was commissioned as a second lieutenant on 4 August. I also received my wings as a pilot on the same date. I am a single engine pilot and received my training at Williams Field, Arizona.

"I came to Lowry Field on 14 December 1944, under orders to enter Flight Engineer School. Shortly after my arrival at Lowry Field, I entered said school and as far as I know I made passing grades.

"However since coming to Denver I have had a cold. I have been on sick call for treatment but my cold continued to hang on. The last time that I went on sick call was about 23 January 1945. I was not told that I was to go to the hospital or to remain in quarters. The medical officer merely gave me some pills.

"I didn't feel well, so I quit said school on 24 January 1945, and have not been back to said school at any time since then. I didn't feel well the first few days after I quit school and after that just decided not to go back until I was told to do so. No one had called me to see why I wasn't in school, so I didn't go back.

"I had not been eliminated from the school, nor had I been washed back at the time when I last attended school.

"During the time since 24 January 1945, I have been here on the post most of the time, just lying around the barracks.

"Other than above stated, I have no excuse for my failure to attend said school since 24 January 1945." (R. 6-7)

4. The accused, after having his rights as a witness explained to him by the law member, elected to remain silent (R. 7).

At the request of defense counsel the court took judicial notice of Army Air Forces Regulation No. 50-8, 31 December 1942, which provides as follows:

"1. Upon graduation from a prescribed course of instruction at an Army Air Forces special service school or at a civil school designated as a proper institution for training military personnel, AAF personnel will not be permitted to undergo a course of instruction in another specialized field until a minimum of one year has elapsed.

"2. This Regulation shall not prevent the following:

a. Personnel from receiving further training in the same specialty within the year. * * *

b. Graduates of a heavier-than-air course of flying at an Army Air Forces advanced flying school, leading to the rating of pilot, who proved themselves unqualified to pilot equipment of unit to which assigned, from receiving additional training in another specialty prior to completion of one year's service."

Two other classes of personnel are excepted from the prohibition of the regulation, but the accused clearly does not come within either of these classes.

5. By his own statement accused admits his assignment to and his entrance in the Flight Engineer School at Lowry Field. He also admits that he "quit" the school on 24 January 1945 without proper authorization from a medical officer, merely because he did not feel well, and that he "just decided not to go back" until he was told to do so. He did not attend the school between 24 January and 2 March. Even if he were actually present "on the post most of the time", as his statement indicates, such presence on the post was not the equivalent of presence with his organization, at the school which he was required to attend (CM 233752, Lewis, 20 BR 93). The record fully supports the findings of guilty.

By requesting the court to take judicial notice of the Army Air Forces Regulation the defense counsel apparently sought to show that accused's assignment to the school was prohibited by the regulation. The evidence does not show that the assignment constituted a violation of the regulation, and even if it did, such an assignment clearly would not afford any excuse to accused for absenting himself from the school without official permission.

6. War Department records show that accused is 26 years of age and is married. He is a high school graduate. He worked as salesman and assistant manager in service station work from January to September 1942, and as a sheet metal mechanic for a shipbuilding concern in California from September 1942 to January 1943. He was inducted into the Army in May 1943, and was commissioned a Second Lieutenant in the Army of the United States on 4 August 1944 upon graduation from the 3010th AAF Base Unit (Pilot School--Adv--SE) at Williams Field, Chandler, Arizona.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial

is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 61.

(Sick in quarters), Judge Advocate

Herbert B. Frederick, Judge Advocate

[illegible], Judge Advocate

SPJGQ - CM 278124 1st Ind

Hq ASF, JAGO, Washington 25, D.C.

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Clarence E. Imm (0-784456), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to and was found guilty of absence without leave for 36 days in violation of Article of War 61. He was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I concur in that opinion.

On 25 January 1945 the accused absented himself without leave from Flight Engineers School at Lowry Field, Colorado, where he had been assigned as a student officer. He remained absent without leave from the school until 2 March 1945. In a signed statement which was introduced in evidence the accused admitted that he "quit" the school on 24 January 1945, without proper authorization from a medical officer, merely because he "didn't feel well", and that he "just decided not to go back until (he) was told to do so." The defense requested the court to take judicial notice of an Army Air Forces Regulation in an apparent attempt to show that the accused had been assigned to the school in violation of the terms of the regulation, which prohibited assignments of Army Air Forces personnel to certain courses of instruction within a year of graduation from certain other schools. The evidence does not show that the accused's assignment to the school constituted a violation of the regulation, and even if it did, no excuse would be afforded thereby to the accused for absenting himself from the school without official permission.

I recommend that the sentence, although inadequate in that no confinement was imposed, be confirmed but that the forfeitures be remitted and that the sentence as thus modified be carried into execution.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

Myron C. Cramer.

2 Incls
1 - Record of trial
2 - Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but forfeitures remitted. G.C.M.O. 239, 19 June 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGH-CM 278125

9 APR 1945

UNITED STATES	ARMY AIR FORCES WESTERN TECHNICAL TRAINING COMMAND
v.	
Second Lieutenant GRANT E. AUSTIN, JR. (0-835571), Air Corps.	Trial by G.C.M., convened at Lowry Field, Denver, Colorado, 16 March 1945. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
TAPPY, GAMBRELL and TREVETHAN, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 61st Article of War

Specification 1: In that 2d Lt. Grant E. Austin, Jr., Air Corps Unassigned, Attached Squadron T, 3705th Army Air Forces Base Unit (Technical School), did, without proper leave, absent himself from Flight Engineers School at Lowry Field, Colorado from about 19 February 1945 to 0930 5 March 1945.

Specification 2: In that 2d Lt. Grant E. Austin, Jr., * * *, did, without proper leave, absent himself from Flight Engineers School at Lowry Field, Colorado from about 3 February 1945 to 12 February 1945.

He pleaded guilty to and was found guilty of the Charge and each Specification thereof. No evidence of any previous conviction was introduced. He was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The only evidence introduced by the prosecution consisted of a stipulation between the prosecution, defense counsel and accused to

the effect that accused made a pre-trial statement to the investigating officer, Lieutenant Colonel Hawley C. Kerr, following an explanation of his rights and that the statement was as follows:

"I came to Lowry Field on 4 January, 1945, under orders to attend Flight Engineers School.

"I was in attendance at said school until 17 February, 1945. I was actually in school on 17 February, 1945, as nearly as I can remember. This last date was the last date that I was present at said school. I was not told by anyone not to continue attending classes in said school. However, I wish to state that the first class which I was scheduled to attend after 17 February was on 19 February. In other words, my absence from school commenced on 19 February, 1945.

"I have no excuse for my failure to be in school subsequent to 17 February, 1945, until this time (5 March, 1945), except that I want to be a pilot.

"During the period from 19 February to 5 March, 1945, I was at all times in Denver, Colorado, except for the times I was on the post at Lowry Field.

"I am trained as a multi-engine pilot. I was on B-24's. I received training on B-24's at Smyrna, Tennessee." (R. 6).

4. The defense introduced no evidence and the accused, after having his rights fully explained, elected to remain silent.

5. The accused's plea of guilty together with his statement made to the investigating officer clearly establishes that accused was absent without leave from 3 February 1945 to 12 February 1945 and again from 19 February 1945 to 5 March 1945 as alleged. The findings of guilty of the Charge and its two Specifications are, accordingly, fully sustained by the record.

6. The War Department records show that accused is 22 years of age and single. After completing the 10th grade of public school he enlisted in the Air Forces 5 August 1940 and thereafter on 26 May 1941 he graduated from Casey Jones School of Aeronautics, Newark, New Jersey. He completed the prescribed training command course at Freeman Field, Seymour, Indiana, was appointed a second lieutenant, Army of the United States, 4 August 1944, and ordered to active duty the same date.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 61.

Thomas N. Tabby, Judge Advocate

William H. Bamberell, Judge Advocate

Robert E. Trevethan, Judge Advocate

SPJGH-CM 278125 1st Ind

Hq ASF, JAGO, Washington 25, D. C.

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Grant E. Austin, Jr. (0-835571), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to and was found guilty of absence without leave on two separate occasions, from 3 February 1945 to 12 February 1945 and again from 19 February 1945 to 5 March 1945, in violation of Article of War 61. He was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I concur in that opinion. While accused was a student at the Flight Engineers School, Lowry Field, Colorado, he absented himself without leave for a period of 9 days, from 3 February 1945 to 12 February 1945 and for a period of 14 days, from 19 February 1945 to 5 March 1945. A letter dated 2 May 1945 from Headquarters Lowry Field, Denver, Colorado, forwarded to this office, states that while in arrest pending the action of this office on this record of trial, accused broke his arrest on 28 April 1945 and was absent from his quarters for a period of several hours.

I recommend that the sentence be confirmed but that the forfeitures be remitted and that as thus modified the sentence be carried into execution.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should such recommendation meet with your approval.

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

3 Incls
1. Record of trial
2. Ltr from Lowry Field, 2 May 45
3. Form of action

(Sentence confirmed but forfeitures remitted. G.C.M.O. 231, 19 June 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGK - CM 278249

9 MAY 1945

UNITED STATES	)	SAN BERNARDINO AIR TECHNICAL SERVICE COMMAND
v.	)	
Captain RAYMOND D. WALDMAN (O-367453), Air Corps.	)	Trial by G.C.M., convened at San Bernardino Army Air Field, California, 8-9 March 1945. Dismissal.

OPINION of the BOARD OF REVIEW
LYON, HEPBURN and MOYSE, Judge Advocates.

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 95th Article of War.

Specification 1: (Finding of not guilty).

Specification 2: In that Captain Raymond D. Waldman, 856th AAF Specialized Depot, did at Ontario, California, on or about November 10, 1944, knowingly, falsely and officially report in a memorandum to Lt. Colonel John Richard Lotze, Commanding Officer of the 856th AAF Specialized Depot, and with intent to deceive the said Lt. Colonel Lotze, that "this officer (Raymond D. Waldman) is in possession of two (2) 30x7 General, 8-ply airplane casings which he has on his private car. These casings are scrap airplane casings which came from this activity sold to Muehlstein and then sold to private dealer by him, whom he in turn bought them from. This officer has a sale slip covering them", which statement wrongfully implied that he, the said Waldman, had purchased these casings which he knew to be false.

CHARGE II: Violation of the 96th Article of War.

Specification 1: In that Captain Raymond D. Waldman, * * *, being Officer-in-Charge of salvage articles, and Purchasing and Contract Officer of aforementioned depot at Ontario, California, did, on or about October 1, 1944, wrongfully accept eight (airplane) casings as a gift from one B. E. Biheller, a representative of H. Muehlstein & Co., under such circumstances as

to bring discredit upon the military service, to the prejudice of good order and military discipline.

Specification 2: (Identical with Specification 2 of Charge I, except that there are added at the end the words, "to the prejudice of good order and military discipline".)

Before accused pleaded to the general issue, defense counsel made a motion that Specification 2 of both Charge I and Charge II be stricken, urging as grounds that the specifications are argumentative and fail to allege facts constituting an offense. This motion was denied. Defense counsel thereupon made a motion that the prosecution be required to elect under Specification 1 of Charge II as to whether it would proceed upon the theory that the acts alleged were to the prejudice of good order and military discipline or upon the theory that they constituted conduct of a nature to bring discredit upon the military service. This motion was likewise denied. During the trial, on the suggestion of the court and by agreement between the prosecution and the defense, Specification 1 of Charge I and Specification 1 of Charge II were amended to show that the alleged offenses occurred in Los Angeles, California (R. 35).

Accused pleaded not guilty to all Charges and Specifications. He was found not guilty of Specification 1 of Charge I, and guilty of all other Specifications and of the Charges. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution.

At all times material to the issues involved, the accused was in the military service and was both salvage and disposal officer and purchasing and contracting officer for the 856th Army Air Forces Specialized Depot, Ontario, California (R. 36).

Under date of 22 June 1944, the War Department or Government and H. Muehlstein Company, Incorporated, a dealer in scrap rubber, with branch offices in Los Angeles, California, entered into a written contract by the terms of which the H. Muehlstein Company purchased and, for the ninety day period between 22 June 1944 and 22 September 1944, was to receive all airplane tires and inner tubes disposed of as scrap or waste material at the Ontario base of the 856th AAF Specialized Depot. The termination date of this contract was extended to 22 October 1944 by a supplemental agreement entered into orally on 15 September and reduced to writing and signed on 28 September 1944. In his capacity as contracting officer, the accused signed both the contract and the supplemental agreement on behalf of the Government. Both were signed on behalf of the H. Muehlstein Company by Mr. B. E. Biheller, manager of its Los Angeles branch. Both instruments were introduced in evidence without objection (R. 12, Ex. A; R. 15, Ex. B).

This contract was let on competitive bids, after bids had been invited a second time. The first invitations for bids, which were sent out during April 1944, produced none that was acceptable, and no contract was let. A bid by the H. Muehlstein Company was among those rejected at that time (R. 11). A short time after the rejection of these first bids accused and a Lieutenant Zieman from Headquarters Ninth Service Command visited the Los Angeles offices of the H. Muehlstein Company in an effort to negotiate a sale of the scrap rubber. The negotiations resulted in a new offer by the company, but not in the consummation of a contract. New invitations for bids were sent out under date of 30 May 1944. The H. Muehlstein Company and one other bidder submitted bids upon this occasion. The scrap rubber was bid for on a unit or per pound basis. The bids were processed in the usual manner, being submitted to both the commanding officer of the 856th AAF Specialized Depot and to Headquarters Ninth Service Command (R. 38). It having been determined that the bid made by the H. Muehlstein Company was the better, the contract was awarded to that company.

The accused and Mr. Biheller first became personally acquainted upon the occasion that accused went to Los Angeles in an effort to negotiate a sale of the tires and tubes (R. 11). They thereafter became good friends, and during the life of the contract, they, together with their respective wives, frequently visited in each other's homes (R. 14).

Shipments under contract, in carload lots, were begun early in July 1944. Under applicable Technical Orders then in effect, all tires and tubes which the inspectors under accused's supervision determined to be no longer repairable and usable on airplanes, except such as were withheld for adjustment with the manufacturer because of defective construction, fell within the classification of "scrap," and were delivered under the contract (R. 40). Some of the tires properly falling into this classification of scrap were still serviceable for use on ground equipment (R. 40-41).

During either the latter part of July or in August 1944, upon an occasion when Mr. Biheller was at Ontario, the accused remarked to him that some of the scrap airplane tires would fit on a passenger car, expressed his need for eight tires and asked if Mr. Biheller could obtain them for him (R. 15-16). Mr. Biheller replied in the affirmative, and upon returning to Los Angeles, had eight "30 by 7" airplane tires selected for accused from among tires theretofore received by the H. Muehlstein Company from the 856th AAF Specialized Depot. These tires were set aside in the company's warehouse, and during either the latter part of September or early part of October 1944, the accused personally called at the warehouse for the tires and carried them away (R. 16,28). At this time accused offered to pay for the tires and requested a sales slip or invoice for them (R. 16,25). The eight tires had cost the H. Muehlstein Company a total of only eighty-seven cents (computed on the basis of the price per pound paid for them under the terms of the contract) (R. 24), and Mr. Biheller told accused that since the dollar value of the tires was negligible, he was not going to send him

a bill or invoice for them, that it would cost more than the amount involved to run the items through the company's books (R. 16). It was Mr. Biheller's intention to make a gift of the tires (R. 25). Accused stated that he definitely wanted a sales slip or invoice in order that the legality of his possession of the tires could not be questioned (R. 16). Mr. Biheller told him to go ahead and forget the matter, that he was not going to send him a bill. Later, upon several different occasions, accused mentioned his desire for a sales slip or invoice for the tires, but Mr. Biheller disregarded these requests and failed to furnish accused with any evidence of ownership (R. 17, 26).

On or about 10 November 1944, Lieutenant Colonel John R. Lotze, Commanding Officer, 856th AAF Specialized Depot, was informed by his intelligence officer, "Lieutenant Coble," that the latter had received a report from a civilian that accused was using airplane tires on his private automobile (R. 36). Colonel Lotze and Lieutenant Coble thereupon investigated and found that accused was using "30 by 7" airplane tires on the rear wheels of his automobile. Accused was called before Colonel Lotze to explain his possession and use of the tires. Accused thereupon stated that while originally the tires had been a part of the Depot's stock of scrap rubber, he had purchased them from a dealer (R. 36). During this conversation, Colonel Lotze expressed the opinion that it was indiscreet and a display of poor judgment for accused to be using the tires on his automobile, and he directed accused to explain in detail his possession of the tires, by written memorandum (R. 36). Accused complied with this directive the same day. The memorandum that he delivered to Colonel Lotze was identified and introduced in evidence without objection (R. 37, Ex. D). It read as follows:

> "This officer is in possession of two (2) 30x7, General, 8 ply airplane casings which he has in his private car. These casings are scrap airplane casings which came from this activity sold to Muehlstein and then sold to a private dealer by him, whom he in turn bought them from. This officer has a sales slip covering them. This officer has looked these casings over personally and found that they are scrap as unfit for use on airplanes, but not on vehicles. To make this more explicit, these casings were sold on Contract No. W 04-407 (SCIX)s-1, and resold."

Colonel Lotze delivered this memorandum to his Intelligence Officer with instructions to "follow through," and did not himself personally participate in the investigation further.

Thereafter, Captain Douglas E. Bergman, assistant Intelligence Officer, SBATSC, either took over the investigation or else conducted an independent investigation of the same matter, from San Bernardino Army Air Field. He first questioned accused on 4 December 1944. During this initial interview, accused was asked if he was in position to present a sales certificate for the tires (R. 50). He replied that his wife had the sales certificate at their home. Captain Bergman thereupon requested that accused

bring the certificate with him upon his next appearance (R. 50). Accused reappeared before Captain Bergman on 6 December and at that time stated that his wife had lost the sales certificate and that he was therefore unable to produce it (R. 50). After further questioning and after Captain Bergman pointed out particulars in which accused's statements made on 6 December were in conflict with statements theretofore made by him on 4 December and in which they were incompatible with the facts as Captain Bergman had learned them from other sources, accused admitted that Mr. Biheller gave him the tires. He stated also that after the inviestigation was begun, Mr. Biheller had, at his request, obtained from a customer of the H. Muehlstein Company and delivered to him a sales certificate for the tires (R. 50). Accused did not at any time produce this sales certificate before Captain Bergman. Being then under orders to attend a school at Wright Field, accused agreed to make a written statement in order that he might proceed. He did this, having been first fully warned and advised of his rights (R. 51). This statement was identified and introduced in evidence without objection (R. 51, Ex. E). In this written pre-trial statement, after setting out fully the circumstances under which the contract was entered into with the H. Muehlstein Company, and his connection with its negotiation, accused made the following statement with reference to obtaining the eight tires in question:

> "* * * I decided I would like to obtain some of these tires that could either be repaired or used without further repair for use on my vehicle. I told Mr. Biheller on approximately the 1st of July, after the contract had been awarded and shipment had started, that I would like to obtain some of these tires for my own use from his yard. He said that I could have some and that he would give them to me. I suggested that I preferred to pay for them in view of army regulations, etc, but Mr. Biheller stated that due to the fact that we were friends, other than business, and that the relative cost was negligible, to overlook it. I arranged then to come into his yard and pick the tires I wanted but due to business I was unable to do so and I suggested that he pick out eight (8) tires for me. I then arranged to pick them up on my next visit to Los Angeles, which would be approximately the 1st of August. This was not done and later, on a visit to Los Angeles about the 1st of October, I picked these tires up and suggested that I get a sales slip and he stated that he would give me one himself but I said I preferred having one from a customer of his, in other words a sales slip from someone other than himself. No money was involved in the transaction but the tires were given to me by Biheller and he said he would arrange for a sales slip from one of his customers, who I am not acquainted with. Later, on a visit to Los Angeles, Mr. Biheller delivered to me a sales slip for the eight tires involved from a Mr. Don Bishop of Don's Tire Shop I believe was the name. I do not have in my possession at the present time the above sales slip due to the fact that my wife misplaced it; however, if necessary, I believe that I can obtain a duplicate sales slip."

Also in this pre-trial statement, accused said that he kept three of the eight tires for his own use, gave four of them to Lieutenant J. H. Walker, a friend, and gave one to Private Malcolm M. Jonas for aiding him in mounting the three tires on his own car. Neither Lieutenant Walker nor Private Jonas paid him any money for the tires they received. Before mounting the tires on his own car, accused buffed off of them the word "airplane" and such other marks as identified them as airplane tires, "so as to eliminate the psychological effect that was likely to develop from an officer driving with airplane tires on his car." He said that the tires were obtained for use on a non-profit basis and without any intent on his part to defraud the Government or anyone else. They were obtained after the contract had been entered into and had no bearing on the contract or on his administration of it (Ex. E).

Captain Bergman, together with a civilian tire inspector, examined all eight of the tires in question. Captain Bergman said that all eight were salvage tires, properly classified as "scrap" under Technical Orders then in effect (R. 53). Pictures were taken of the three tires found on accused's automobile and these pictures were introduced in evidence without objection (R. 52-53, Exs. F,G,H,I). The pictures show where the identifying marks had been buffed off the tires.

During cross-examination, upon being questioned with reference to whether airplane tires were in common use on private vehicles, and with reference to the disposition made by the H. Muehlstein Company of tires purchased by it as scrap rubber, Captain Bergman made the following statement:

> "* * * Let me answer that question this way. I can give the facts as far as I know. Biheller is the representative of Muehlstein Company, which is one of the two scrap rubber dealers in the country who operate on a large scale. They were a representative of the Rubber Reserve Company, which under the old set-up took over scrap rubber up until January 1 last year. Now they then - all the wholesalers - they re-sell these tires on any basis that they can. Those that can be re-sold for use, they sell on that basis. Those which are damaged beyond repair, that can not be better used, they sell for scrap rubber back to the rubber companies. Biheller had a contract with this Don Bishop, or Bishop Tire Company, who allegedly gave the sales slip in this case, to purchase so many tires from the Muehlstein Company each day. Bishop actually maintained his place of business right at the Biheller yard, and he spent each day, together with employees that he had there, picking out tires that he could use for re-sale. He then re-sold those tires for a while to various dealers in and around Los Angeles. At the time the investigation was conducted, he sold to one used tire dealer. Biheller sold tires for - my recollection is that he had a contract

for seventy cents a tire that he charged Bishop. Bishop then re-sold them on the basis - that is the tires that were repairable or recappable to resell - of $1.50 to this dealer and then those tires which didn't require repairs, but which were good enough for use as they stood, he paid a dollar for, and re-sold them to a dealer for two dollars, who then re-sold them at whatever retail price he could get. There was no OPA ceiling on airplane tires because no one anticipated they could be used on ground equipment, and you could buy or sell at any price you could bargain for. * * *" (R. 56).

Mr. Biheller stated that sometime in either November or December 1944 (in December, he believed), the accused advised him that he (accused) was being investigated for having the airplane tires on his car, and requested that Mr. Biheller procure for him a sales slip covering the tires. Accused suggested that in view of their business relations, it would be better if the sales slip were issued by someone other than the H. Muehlstein Company (R. 17). Mr. Biheller thereupon procured from Don Bishop and delivered to accused a sales slip which purported to convey to accused the eight tires in question (R. 17). An instrument dated 6 October 1944, identified by Don Bishop as a true copy of the sales slip which he delivered to Mr. Biheller, was introduced in evidence (R. 30, Ex. C). It purported to convey to accused eight used airplane tires at a price of $2.50 per tire, the total amount of the bill being $20.50, including tax. Mr. Bishop stated that he delivered the original of this instrument to Mr. Biheller, at the latter's request, sometime during the latter part of November or the early part of December 1944 (R. 33,34).

Over objection by defense counsel, Mr. Biheller was permitted to testify that by telephone the accused requested that, in the event Mr. Biheller were questioned about the matter, he inform his questioner that accused purchased the tires from Don Bishop (R. 21). Likewise over objection, Mr. Bishop was permitted to testify that upon one occasion, after remarking to him that he did not think there would be any aftermath to the sales slip, accused added, "If there is, why all you have to say is that my wife came down with Mr. Biheller to your place on Western and picked up the tires and gave you the money" (R. 33).

Mr. Biheller stated that all parties concerned acted in perfect good faith, both in entering into and in keeping both the contract and the supplemental agreement between the H. Muehlstein Company and the Government. Both the contract and the supplemental agreement were scrupulously carried out by the makers. Accused had not mentioned getting any tires for himself prior to the time the contract was entered into and did not at any time make any improper request of him (Mr. Biheller), nor did the H. Muehlstein Company receive any tires or tubes that were not properly classifiable as "scrap" (R. 22-23). The H. Muehlstein Company was the world's largest dealer in scrap rubber, doing an annual volume of business in excess of

one million dollars (R. 22).

4. For the defense.

A motion for findings of not guilty of Specification 1 of both Charge I and Charge II was made and denied.

Colonel Lotze, recalled as a witness for the defense, expressed the opinion that both the contract and the supplemental agreement between the H. Muehlstein Company and the Government were entered into in good faith and that only tires and tubes properly classified as "scrap" were delivered thereunder (R. 64). Mr. Stewart A. Findley, Chief Inspector at the 856th Specialized Depot, who was responsible for the inspection and proper classification of all tires handled at the Depot, stated that at no time did accused ever request him to classify as "scrap" any tire that was not, and that all tires classified as "scrap" properly belonged in that classification (R. 72). Mr. Wilbert C. Johnson and Private Malcolm M. Jonas, tire inspectors at the Depot, the former of whom had had 26 years' experience in the rubber industry and the latter of whom had had eight, likewise stated that at no time did accused ever request them to make an improper classification of a tire (R. 70,75). Both expressed the opinion that accused understood the salvage business and was well qualified for the job he held (R. 68,75). Mr. Johnson stated that the grading was done under rules that rarely left any question as to the classification to be given a tire. He and accused had often examined tires together and had always been in accord in their appraisals (R. 75).

Private Jonas, to whom accused gave one of the tires for aiding him in mounting his own, stated that it was common knowledge around the Depot that the airplane tires could be used on passenger cars. He himself had mentioned this fact to accused, to Colonel Lotze, and to a number of civilians and had pointed out to them that some of the scrap tires were still serviceable for that purpose (R. 68). He requested accused to get some of the tires for him and accused agreed to try (R. 69). He paid no money for the tire he received from accused and returned the tire to accused upon hearing of the investigation (R. 69,70).

Lieutenant John H. Walker stated that accused gave four of the tires in question to him early in October 1944, refusing to accept payment for them (R. 64A,65). Lieutenant Walker had previously expressed to accused a desire to purchase some of the tires if the "Contractor" was selling them. Accused promised to find out whether or not the tires could be purchased and to get some for Lieutenant Walker if he could (R. 64A). Lieutenant Walker was still using the tires on his automobile and had driven them approximately 3500 miles since October (R. 66).

Photographs of a tire recapping station (Blencoe & Ryan) situated in Santa Ana, California, and of tires on display at the station were identified by the photographer and introduced in evidence (R. 77-79, Def. Exs.

1,2). The photographs were taken during the week preceding the week of trial. One shows an advertisement, painted in large lettering extending completely across the front of the station, advertising "Airplane Tires" for sale and stating that no certificates were needed for their purchase (Def. Ex. 1). The other shows a tire of the same size as those in question that was on display in front of the station, upon which the words "Royal Airplane Tire" clearly appeared (Def. Ex. 2). The photographer stated that there were at least 15 to 25 similar tires on display inside and outside the station (R. 79). Mr. Paul Dutton, operator of a filling station in Santa Ana, stated that the tire station shown by the picture had been advertising and selling airplane tires for use on privately owned vehicles since sometime in October 1944 (R. 82). The tires were in common use on private passenger cars and trucks, and some of the larger airplane tires were being used on tractors (R. 83).

Upon being advised of his right to testify under oath, to make an unsworn statement, or to remain silent, the accused elected to testify under oath. He was born in Denver, Colorado, attended public schools through the second year of high school, attended an accredited military school for two years and then attended Purdue University, where he studied Mechanical Engineering and had one year of R.O.T.C. training. He did not graduate from Purdue. He was commissioned in the Officers Reserve Corps on 16 May 1938. He is engaged in the restaurant business in Denver, Colorado, operating under the trade name of "Waldman's Donut Shop" (R. 86). Financial statements, which accused stated were prepared by a Certified Public Accountant, and which show that accused was one of two partners owning equal interests in Waldman's Donut Shop, that the partnership had a net worth of $16,070.06 as of 31 December 1944 and that its net earnings for the calendar year of 1944 amounted to $10,129.14, were introduced in evidence (R. 86-87, Def. Ex. 3). Accused was called to extended active duty on 6 January 1942. Following findings of a Retirement Board, he was ordered retired from active duty for physical reasons, effective 29 November 1943. He protested against being retired, and as a result of his protest and of letters which he obtained from Brigadier Generals H. S. Burwell and Morris Berman and Lieutenant Colonel Gardner Brown, setting out that accused's services were urgently needed, he was restored to an active duty status. The mentioned letters were introduced in evidence (R. 87, Def. Exs. 4,5,6). In January 1944, he was assigned to duty at Ontario as Chief, Rubber Salvage and Disposal Division, and in May was made Purchasing and Contracting Officer (R. 88). He first met Mr. Biheller while endeavoring to negotiate a sale of the scrap rubber. He asked Mr. Biheller for no personal favors and did not mention getting tires for his own personal use prior to the time that the contract was entered into on 22 June 1944 (R. 89). The contract as finally let was approved at Headquarters Ninth Service Command (R. 89). As he recalled, it was sometime in August 1944 that he first asked Mr. Biheller about getting tires (R. 89-90). At the time of first mentioning

the matter, he told Mr. Biheller that he would like to buy some of the tires if Mr. Biheller could arrange it. Mr. Biheller replied that he thought it could be arranged (R. 90). At the time of actually acquiring possession of the tires in Los Angeles, he asked Mr. Biheller how much he (accused) owed for them. Mr. Biheller replied that the amount was negligible, to which accused replied, "That's all right, I still want to - want you to charge me for them and I want to pay for them" (R. 90). Mr. Biheller insisted that he did not want to charge accused for the tires because he did not want to charge more than the tires had cost, and the amount involved would not justify the bookkeeping involved. Accused told him that he wanted something to evidence the fact that his possession of the tires was legal, so as to avoid embarrassment to himself, his command, or anyone else concerned (R. 91). Lieutenant Walker and Private Jonas had previously asked accused to get tires for them, and accused asked for and obtained the eight tires in order that he might have two for his own use, four for Lieutenant Walker, and two for Private Jonas (R. 91). He gave four of the tires to Lieutenant Walker, refusing to accept pay, which was tendered (R. 91). He delivered two tires to Private Jonas but, through mistake, gave him only one of the airplane tires (R. 92). Upon at least five different occasions between the time he came into possession of the tires in October and the time he appeared before Colonel Lotze on 10 November 1944, accused talked to Mr. Biheller about the latter's giving him a bill for the tires (R. 93). Since Mr. Biheller did not himself want to give a bill for the tires accused finally, during one of the conversations that took place before 10 November, asked him if he (Biheller) could get one of his customers to give him (accused) a sales slip. Mr. Biheller replied that he thought that could be arranged, and agreed to attend to it (R. 93). Accused was not under the impression that he was called before Colonel Lotze on 10 November 1944 with especial reference to the tires. The matter arose incidentally while he was in Colonel Lotze's office on other business. Colonel Lotze saw the tires on accused's car, which was parked nearby, and asked what kind they were (R. 93). Accused replied that they were airplane tires, whereupon Colonel Lotze asked where they came from. Accused replied, "They came from here, * * * but I didn't take them off this place here." The ensuing conversation between himself and Colonel Lotze was recounted by accused as follows:

> "He says, 'Are you covered on the deal?' I said, 'Yes, I am.' He said, 'Well, how are you covered?' I says, 'I have a sales slip concerning that.' He says, 'You have?' I said, 'Yes.' He says, 'I think that was a very indiscreet thing to do, inasmuch as you are the one in charge of the Salvage and Disposal, obtaining tires' - pardon me, I mean 'using tires that were obtained from the activity. You are liable to bring criticism on yourself.' I says, 'Do you want me to take the tires off?' He says, 'No, that won't be necessary.' He says, 'Just write me a memo to the effect, for my file, what you have just told me."

Colonel Lotze definitely stated that he wanted the memorandum for his file, and in testifying that he did not assign that as his reason for wanting it, he was mistaken (R. 94). He did not at the time inform accused that the matter was under official investigation from any source. Accused did not feel that there was anything wrong about the manner in which he had acquired possession of the tires, or in the fact that he was in possession of them, but when Colonel Lotze failed to accept his verbal explanation of the matter and demanded a written memorandum, it caused him to worry. He and Colonel Lotze had not gotten along well together, either in their personal relations or in their business relations. One thing which had caused friction between them was that accused had made a number of suggestions intended to improve the efficiency of their department, which suggestions had been promptly turned down by Colonel Lotze, only to be adopted later without accused receiving credit for them (R. 95). After thinking the matter over, accused concluded that Colonel Lotze was out to "hang" him, and he became "panicky." Having already told Colonel Lotze that he had a sales slip for the tires, he felt that he had to include that representation in his written memorandum, and accordingly did so. The representation was false and he knew it was false at the time he made it (R. 95). He knows now that it was wrong and regrets having made the false statement. It is the only thing of its kind he has ever done; the only act of his career that he has occasion to regret (R. 95). Mr. Biheller had already told him that he would procure the sales slip for him and he assumed that he would (R. 95). Accused intended to pay for the tires when he got them from Mr. Biheller and the only reason he did not was because Mr. Biheller did not want to accept pay for them (R. 96). He buffed the identifying marks off the tires, not because he thought there was anything wrong about his possessing them or the manner in which he had acquired them but only because, due to the position which he held, civilians might be suspicious of his use of airplane tires, a thing which he wanted to avoid (R. 96). Without their identifying marks the tires would not be recognized by the ordinary individual as airplane tires, but they would be readily recognized for what they were by a person who knew tires (R. 96).

On cross-examination, accused said that he was not certain when he first talked to Mr. Biheller about getting the tires, whether it was in August, as he testified, or around 1 July 1944, as set out in his pretrial statement to Captain Bergman, but that the contract had been in effect for approximately a month and that approximately fifteen cars of tires had been shipped under it (R. 97). Accused stated that the following statement contained in his pretrial statement to Captain Bergman was correct:

> "I suggested that I preferred to pay for them in view of army regulations, etc., but Mr. Biheller stated that due to the fact that we were friends, other than business, and that the relative cost was negligible, to overlook it."

And that he and Mr. Biheller actually had that conversation the first time they discussed the tires (R. 98).

5. Specification 2 of both Charge I and Charge II. These specifications charge the identical offense, viz., that of having made a false official statement with intent to deceive, as a violation of both Article of War 95 and Article of War 96. This is permissible and there is no inconsistency in findings of guilty under both Charges, nor are the findings illegal as placing accused twice in jeopardy for the same offense (CM 230222, Daly, 17 B.R. 331, II Bull. JAG, March 1943, p. 96; CM 252773, Jonas, 34 B.R. 189, III Bull. JAG, August 1944, p. 345). The specifications are legally sufficient to charge the offenses intended and are not vulnerable to the objections urged against them by defense counsel. They quote fully the material portions of accused's memorandum to Colonel Lotze, and sufficiently allege that the representations of fact therein contained were false, that they were known by accused to be false at the time he made them, and that they were made in an official report with intent to deceive. Accused's report to Colonel Lotze, as quoted in the specifications, when considered as a whole, is not deemed ambiguous. Accused therein clearly stated that he purchased the casings from a private dealer and had a sale slip covering them. There was no need for the pleader to attempt to explain in the specifications what accused meant by statements which were quoted with sufficient fullness to make obvious what he had clearly represented. The fact that, in directing attention to the particular portion of the memorandum claimed to be false, the pleader alleged that accused "implied" that which he had in fact clearly stated neither rendered the specifications argumentative nor accused's actual representations less certain. We are unable to see wherein accused could have suffered injury as a result of the form of the specifications. The motion to strike was properly denied. There is no dispute in the evidence about the fact that accused's representations that he purchased the casings from a private dealer and had a sale slip covering them were false and known to him to be false at the time he made them. They were made by accused to his commanding officer, in a report which the latter, acting fully within his rights, had directed accused to make. The report or memorandum was therefore an official statement, and the false representations were obviously made with intent to deceive. It is too well established to permit of discussion that for an officer to make a false official statement with intent to deceive constitutes a violation of both Article of War 95 and Article of War 96 (Dig. Op. JAG, 1912-40, sec. 453 (18), and Sec. 454(49); par. 152a, MCM 1928). It follows that the record is legally sufficient to support the findings of guilty of Specification 2 of Charge I and Specification 2 of Charge II. The only punishment imposed was that of dismissal, so it is apparent that the act which was charged as two offenses was treated by the court as but a single offense for the purpose of punishment.

Specification 1 of Charge II. This specification charges, as a violation of Article of War 96, the identical offense that Specification 1 of Charge I, of which specification accused was found not guilty, charged as a violation of Article of War 95. There is no legal inconsistency in the two findings; proof of facts which would support a finding of guilty under

Article of War 96 would not necessarily support a finding of guilty under Article of War 95 (CM 230222, Daly, supra). Furthermore, the Board of Review has heretofore committed itself to the rule that inconsistent verdicts of guilty and not guilty do not vitiate the former (CM 197115 (1931), 3 B.R. 81, Dig. Op. JAG 1912-40, sec. 395 (44), p. 230; CM ETO 1453 (1944), III Bull. JAG, p. 285). There is no dispute in the evidence about the fact that accused received the eight tires in question as a gift. Nor can there be any doubt that at the time of acquiring possession of the tires, accused knew he was receiving them as a gift. Accepting accused's own version of the transaction, as contained in his pre-trial statement, reaffirmed in this particular during the trial, Mr. Biheller made it clear the first time accused talked to him about getting the tires that he intended to make a gift of them. This was several weeks before possession of the tires passed to accused. Accused accepted this gratuity from the branch manager of a corporation with which it was his duty to carry on negotiations as an agent of the Government, and the gift was bestowed from property belonging to the corporation. The contract, which accused had been instrumental in negotiating and which he had signed in his official capacity, was still in effect, and the tires that were delivered thereunder as "scrap" were graded and classified under accused's supervision. In addition, after accused had made arrangements for obtaining the tires in question, the contract was extended thirty days beyond its original termination date. Even though the gift may not in fact have influenced the accused either consciously or subconsciously to the extent of rendering him less independent, exacting and zealous in the performance of his duties as salvage or contracting officer, it cannot be denied that in view of the relationship between the parties and the attending circumstances in this case the acceptance of the gift by the accused not only brought discredit upon the military service but constituted conduct prejudicial to good order and military discipline in violation of Article of War 96, in that the transaction was in contravention of the spirit if not the letter of the following Army Regulations, to wit:

> "There are limitations upon the activities of officers and other personnel subject to military law. The general principle underlying such limitations is that every member of the Military Establishment, when subject to military law, is bound to refrain from all business and professional activities and interests not directly connected with his military duties which would tend to interfere with or hamper in any degree his full and proper discharge of such duties or would normally give rise to a reasonable suspicion that such participation would have that effect. Any substantial departure from this underlying principle would constitute conduct punishable under the Articles of War." (par. 2e(2), AR 600-10, 8 July 1944).

The regulations themselves give the following as an example of outside activities to which they have reference:

> "Acceptance by an officer of a substantial loan or gift or any emolument from a person or firm with whom it is the

officer's duty as an agent of the Government to carry on negotiations." (par. 2e(2)(a)1, AR 600-10, 8 July 1944).

It is true that because of the manner in which they were purchased the cost of the tires to the H. Muehlstein Company was only a nominal sum, but this is not necessarily the test or standard by which to measure their value or worth to the accused. It is common knowledge that at the time the gift was made, automobile tires could not be purchased at will on the open market. Under such circumstances, the gift of eight serviceable tires must be considered as a substantial gift. The record is legally sufficient to support the finding of guilty of Specification 1 of Charge II. It should be added, however, in fairness to the accused, that no contention was made and there is no evidence to show that he was guilty of fraud in his dealings with the H. Muehlstein Company.

No error was committed by the court in permitting Mr. Biheller and Mr. Bishop to testify that accused requested them to misrepresent to anyone inquiring of them the true source from which and manner in which he had acquired the tires. The evidence was admissible as tending to show a consciousness of guilt.

6. War Department records disclose that this officer is 32 years of age, married, and the father of one child. He attended Kemper Military School for two years and Purdue University for four years. In 1930 he was nominated by United States Senator Lawrence C. Phipps for examination, as First Alternate Candidate from the State of Colorado at large, for admission to the United States Military Academy. He failed to pass the mental examinations and was found to be physically disqualified for admission to the Academy because of defective vision. In private life he was engaged in the restaurant business in Denver, Colorado. On 3 May 1938, he was appointed as a second lieutenant, Army of the United States, Officers' Reserve Corps (Infantry). After a number of brief tours of active duty, he was ordered to extended active duty on 6 January 1942. He was promoted to the grade of first lieutenant on 12 June 1942 and to the grade of captain on 17 February 1943. As the result of a Retirement Board's having found him physically disqualified for military service because of defective vision, he was retired from active duty on 29 November 1943. He was ordered back to active duty for limited service on 9 December 1943.

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence

and to warrant confirmation of the sentence. A sentence of dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of a violation of Article of War 96.

Percy W. Ferry, Judge Advocate.

Earle Stephens, Judge Advocate.

Thomas Mayo, Judge Advocate.

SPJGK - CM 278249 1st Ind.

Hq ASF, JAGO, Washington 25, D. C.

TO: The Secretary of War.

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Raymond D. Waldman (O-367453), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of making a false official statement with intent to deceive in violation of Article of War 95 (Charge I) and of wrongfully accepting a gift from a representative of a government contractor in violation of Article of War 96 (Charge II). He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. I concur in that opinion.

After a contract had been legally and properly entered into between a private contractor and the United States for the sale to the former of rubber, classified as scrap, and had been in force for some weeks, accused, who was the contracting officer, sought to purchase eight rubber casings or tires, which were a part of the scrap purchased by the private contractor. Because these tires represented an investment of only 87 cents to the contractor and because of the personal friendly relations between him and accused, the contractor insisted that accused accept the tires without cost, which the accused did. Subsequently, accused gave five of them to other military personnel. When questioned by his superior officer concerning the presence of two airplane tires on his car, accused falsely stated that after their sale as scrap he had purchased them from a dealer and had a bill of sale for them. Subsequently and in a formal investigation he disclosed all the details of the transaction. It was not contended nor was any proof offered to show or suggest that there was any fraud or impropriety connected with the contract or with the classification of the tires as scrap. In explanation and extenuation of his action in making an untrue statement to his superior officer, accused contended that, while he was convinced that he had done nothing wrong, he was disturbed and became "panicky" over the possibility that that officer, with whom his relations had not been cordial, might misconstrue what he had done and have him prosecuted.

Although accused's acceptance of the tires as a gift was both improper and indiscreet, and his action in making a false statement to a

superior officer can neither be excused nor condoned, in view of the fact that there is not even a suggestion that the transaction with the contractor was in any way tainted with fraud, and that accused's statements were in actuality most probably prompted by a sudden fear of prosecution rather than by a calculated or deliberate intention to deceive, and in view of accused's past excellent military record and desire to serve, as well evidenced by his successful effort to be returned to active duty after having been classified as physically disqualified, I recommend that the sentence be confirmed but commuted to a reprimand and a forfeiture of $50 per month of his pay for a period of six months, and that the sentence as thus modified be carried into execution.

4. Consideration has been given to a letter from Senator Edwin C. Johnson on behalf of the accused. This letter accompanies the record of trial.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

3 Incls
1. Record of trial
2. Form of action
3. Ltr fr Sen Edwin C. Johnson

(Sentence confirmed but commuted to a reprimand and forfeitures of $50. pay per month for six months. G.C.M.O. 254, 19 June 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGN-CM 278300

UNITED STATES v. Second Lieutenant ROBERT E. DALY (0-838697), Air Corps.	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Napier Field, Dothan, Alabama, 20 March 1945. Dismissal, total forfeitures and confinement for three (3) years.

OPINION of the BOARD OF REVIEW
LIPSCOMB, O'CONNOR and MORGAN, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charges and Specifications:

CHARGE: Violation of the 96th Article of War

Specification 1: In that Second Lieutenant Robert E. Daly, Section "B", 2116th Army Air Forces Base Unit, Army Air Forces Pilot School (Advanced - Single Engine), Napier Field, Dothan, Alabama, did, at Napier Field, Dothan, Alabama, on or about 12 January 1945, wrongfully take and use without the consent of the owner, a certain automobile, to wit: "a 1941 Buick convertible coupe", property of Flight Officer George W. Malkson, Napier Field, Alabama, of a value of more than $50.00.

Specification 2: In that Second Lieutenant Robert E. Daly, Section "B", 2116th Army Air Forces Base Unit, Army Air Forces Pilot School (Advanced - Single Engine), Napier Field, Dothan, Alabama, did, near Blakely, Georgia, on or about 13 January 1945, transport and cause to be transported in interstate commerce; to wit: from the State of Alabama into the State of Georgia, a motor vehicle, to wit: "a 1941 Buick convertible coupe", knowing the same to have been stolen.

ADDITIONAL CHARGE I: Violation of the 93rd Article of War.

Specification: In that Second Lieutenant Robert E. Daly, Air Corps, Squadron "B", 2116th Army Air Forces Base Unit, Army Air Forces Pilot School (Advanced - Single Engine), Napier Field, Dothan, Alabama, did, at Army Air Forces Pilot School (Advanced - Single Engine), Napier Field, Dothan, Alabama, on or about 5 March 1945, feloniously take, steal and carry away one brown leather wallet of some value and lawful money of the United States of the value of about one hundred and forty-five dollars ($145.00), the property of Second Lieutenant Howell E. Mills.

ADDITIONAL CHARGE II: Violation of the 94th Article of War.

Specification: In that Second Lieutenant Robert E. Daly, Air Corps, Squadron "B", 2116th Army Air Forces Base Unit, Army Air Forces Pilot School (Advanced - Single Engine), Napier Field, Dothan, Alabama, did, at Army Air Forces Pilot School (Advanced - Single Engine), Napier Field, Dothan, Alabama, on or about 5 March 1945, feloniously take, steal, and carry away one Identification card, War Department, Adjutant General's Office, Number 65, of some value, and one Army Air Forces Number 206 Pilot and Crew Member Physical Record Card of some value, property of the United States furnished and intended for the military service thereof.

He pleaded guilty to, and was found guilty of, all Charges and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for three (3) years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution: The accused, a second lieutenant in the Air Corps, was stationed at Napier Field, Dothan, Alabama (R. 6a, 6c; Pros. Ex. 4). On the night of 12 January 1945 he took an automobile from a parking lot near his barracks, drove it off the field and into Dothan, parked it, and then returned to the field. The car, a 1941 Buick Convertible Coupe valued at $1345, belonged to Flight Officer George W. Malkson, who had not given accused permission to use it and did not know him (R. 6a; Pros. Exs. 1, 3, 4).

About 1400 the following day, 13 January 1945, accused went into Dothan and began to drive the car to Colquitt, Georgia (Pros. Ex. 4). Two Alabama state highway patrolmen, who had received a report that the car was stolen, saw accused as he approached Columbia, Alabama, and gave chase. They pursued accused for a distance of 30 miles during which he attained speed of over 90 miles per hour and passed over the state line into Georgia. The engine having begun to smoke near Blakely, Georgia, he abandoned the car and attempted to hide under an old house, but he was quickly discovered and taken into custody (R. 6a; Pros. Ex. 2 and 4).

He was interviewed by an investigating officer on 14 January 1945 concerning the foregoing offenses and, after being warned of his rights under Article of War 24, gave a signed statement admitting his theft of the car and its transportation across the state line. He asserted that he had taken the car because he had some personal business of an urgent nature at Colquitt and that he intended to leave the car at Dothan for the owner when the trip was completed (R. 6b, 6c; Pros. Ex. 4).

Sometime prior to 4 March 1945 three of accused's checks in the amounts of $100, $45, and $19 were dishonored, and he was pressed for payment (R. 6d; Pros. Ex. 7). During the night of 4 March he went to the bed of Second Lieutenant Howell E. Mills, who lived in the same barracks, and extracted Lieutenant Mills' wallet from his trousers which were hanging there. Accused removed the money amounting to $145 from the wallet together with Lieutenant Mills' "AGO Identification Card", Mess Card, and "AAF Form No. 206" (Physical Fitness Record). He burned the wallet and remaining papers therein. The following morning, while Lieutenant Mills was in the act of searching for his wallet, accused inquired, "Is anybody missing a wallet?" and pretended that his own wallet had been stolen also (R. 6c; Pros. Exs. 5,7). The quarters of accused were searched on the morning of 7 March and the identification card and other forms belonging to Lieutenant Mills were discovered hidden in the bottom of a volt ammeter which accused said was his property (6d-6h; Pros. Exs. 8,9). Accused, after being warned of his rights, thereupon signed a statement admitting the theft (Pros. Ex. 7).

4. Evidence for the defense: Accused, cognizant of his rights, elected to testify in his own behalf (R. 6h). He stated that he had been married for the past two years, but while taking his primary training in the spring of 1944, he had become involved in a liaison with a girl from Colquitt, Georgia. He attempted to terminate this affair and, when he left primary training, he did not tell her where he was going. His wife visited him for a time while he was stationed at Napier Field and this girl saw them together and learned that he was married. The girl thereupon wrote accused threatening to inform his wife and parents about his marital infidelity (R. 6h, 6i). Apprehensive of the possible outcome, accused wrote the girl asking to see her so that he might "explain" but received no answer. His further letters were also unanswered and his requests that she get in touch with him by telephone were unheeded. It was under these circumstances that, on 12 January 1945, he decided to visit her and to that end he took Flight Officer Malkson's car from the field. However, after getting into Dothan, he decided to defer his visit until the following day and left the car there until the next afternoon. "After all this had occurred and this whole situation was investigated", accused agreed to pay Malkson $545 for damage to the car (R. 6i, 6j, 6k).

Accused borrowed $400 from his folks at home and wrote two checks for $100 and $45 which he gave Malkson. Having made an allotment of $150 per month to his bank in New York, effective January 1945, the accused

believed that the January allotment would be credited to his account by the time the checks, which were written in February, had cleared. A few days after delivering the checks he received a letter "from the Office of Dependency Benefits in New Jersey" stating that his allotment check had been returned "because it bore incorrect address to the bank". As a consequence the checks he had written were returned for "insufficient funds" and demands for payment were made by Malkson and also the manager of the Dothan bank where the $100 check had been cashed. Accused went to see the Finance Officer, who refused to pay him until accused adjusted the matter with the New York bank and the Office of Dependency Benefits. The manager of the Dothan bank was insistent and told accused that, if the check were not redeemed, his commanding officer would be informed of the matter on 5 March. The accused thereupon became "sort of panicky" (R. 6k, 61).

5. a. It is alleged in Specification 1 of the Charge that on 12 January 1945 at Napier Field, Alabama, accused did wrongfully take and use without the consent of the owner a 1941 Buick Convertible Coupe belonging to Flight Officer George W. Malkson of a value more than $50, and under Specification 2 of the same Charge that on 13 January 1945 accused transported this car in interstate commerce from Alabama to Georgia, knowing it was stolen, all in violation of Article of War 96.

The theft and transportation of the car in interstate commerce by accused were not only admitted by his pleas of guilty but also fully proved by his testimony and the evidence introduced by the prosecution. The circumstances surrounding the taking of the car indicated an absence of any intent on accused's part permanently to deprive the owner of possession and therefore precluded conviction of larceny. However, all of the elements of the offense of wrongfully taking and using a car without the consent of the owner were present. It was also clearly shown that after stealing the car accused drove it across the state boundary line from Alabama into Georgia. The transportation of a motor vehicle in interstate commerce, with knowledge that it is stolen, is an offense denounced by the National Motor Vehicle Theft Act (18 U.S.C. 408) and is a violation of the 96th Article of War. CM 228274, Small, 16 B.R. 115. The word "stolen" is held to be used in the Act "not in the technical sense of what constitutes larceny, but in its well known and accepted meaning of taking the personal property of another for one's own use without right or law". United States v. Adcock, 49 F. Supp. 351. The Specifications of the Charge are accordingly sustained.

b. The Specification of Additional Charge I alleges the larceny by accused of a wallet and $145 belonging to Second Lieutenant Howell E. Mills. The Specification of Additional Charge II alleges the larceny by accused of an identification card and a physical record card, the property of the United States furnished and intended for the military service. The former Specification is laid under Article of War 93 and the latter under Article of War 94.

The larceny of the money and articles described is established by the testimony for the prosecution and admitted by the pleas of guilty of accused. Although accused may have found himself in a straitened financial emergency through no fault of his own, this condition obviously did not justify him in securing relief by surreptitiously purloining the money of another. His offense is rendered the more despicable in that his victim was a fellow officer and acquaintance occupying an adjoining bed in the same barracks. The Specifications are sustained.

Since Lieutenant Mills' identification card and his physical record card were in his wallet with his money and were taken simultaneously, the theft might well have been laid in a single Specification under Article of War 93. Although the ownership of the cards was in the United States, Lieutenant Mills had a sufficient property interest to support an allegation of ownership in him. CM 266206 (1944), IV Bull. JAG 12. However, the manner of pleading adopted was permissible.

6. The accused was born 2 August 1924 and is, therefore, about 20 years 9 months of age. War Department records disclose that he is married, a native of New York, and a high school graduate. He has been employed as a repair and service man for radios and electronic musical instruments. He entered the military service on 20 April 1943 and, having completed the prescribed course of training as an aviation cadet, was commissioned a temporary second lieutenant in the Army of the United States on 23 December 1944, entering upon active duty on that date.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of the 93rd, 94th, or 96th Article of War.

Abner E. Lipscomb, Judge Advocate.

Robert Stamm, Judge Advocate.

_____, Judge Advocate.

SPJGN-CM 278300 1st Ind
Hq ASF, JAGO, Washington 25, D.C.

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Robert E. Daly (0-838697), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to, and was found guilty of, wrongfully taking an automobile without the consent of the owner and of transporting it in interstate commerce knowing it was stolen, in violation of Article of War 96; of the larceny of a wallet containing $145, in violation of Article of War 93; and of the larceny of an identification card and a physical record card, in violation of Article of War 94. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for three years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof.

The accused wrongfully took the automobile of another officer, without his knowledge or consent, from a parking place on Napier Field, Dothan, Alabama, and drove it across the state line into Georgia. State police gave chase and took accused into custody after a wild ride. Accused's excuse for his actions was that a young lady living nearby in Georgia, with whom he had formerly been intimate, had threatened to write accused's wife about his infidelity and it was necessary for him to secure immediate transportation in order to visit the young lady and attempt to dissuade her from carrying out her threat. About two months later accused stole the wallet of an officer living in his barracks. The wallet contained $145 and War Department identification and physical record cards. Accused's excuse for this offense was that checks, which he had given to pay for damage to the stolen car, were dishonored when his allotment check to his bank miscarried and that he was confronted with a financial crisis.

Accused's excuses fail to disclose any valid reason for the exercise of clemency. I recommend that the sentence be confirmed but

that the forfeitures be remitted and that the sentence as thus modified be ordered executed. I further recommend that the Federal Reformatory, El Reno, Oklahoma, be designated as the place of confinement.

4. Careful consideration has been given to letters from the accused and his parents requesting clemency.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

5 Incls
Incl 1 - Record of trial
Incl 2 - Form of action
Incl 3 - Ltr. fr. Mrs. Alfred W. Daly, mother of accused.
Incl 4 - Ltr. fr. Mr. & Mrs. Alfred W. Daly, w/incl.
Incl 5 - Ltr. fr. accused.

(Sentence confirmed but forfeitures remitted. G.C.M.O 233, 19 June 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGQ - CM 278409

UNITED STATES v. First Lieutenant FLEM W. SLEETH (0-1797731), Corps of Military Police.	NINTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Cooke, California, 13 March 1945. Dismissal.

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OPINION of the BOARD OF REVIEW
ANDREWS, FREDERICK and BIERER, Judge Advocates

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1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant Flem W. Sleeth, Service Command Unit 1908, Camp Cooke, California, did, at Santa Maria, California, on or about October 1, 1944, wrongfully strike First Lieutenant Charles J. Hughes on and about the head and face with his fist.

Specification 2: (Finding of not guilty.)

He pleaded not guilty to the Charge and its Specifications. He was found guilty of the Charge and Specification 1 thereof, and not guilty of Specification 2 thereof. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution with respect to Specification 1 of the Charge shows that on 1 October 1944, at about 10:30 p.m., First Lieutenant Charles J. Hughes, accompanied by Mrs. Mary Eva Honn, parked his automobile to the right of, and "very close" to another automobile in which the accused and a woman companion were sitting, in front of a restaurant in Santa Maria, California (R. 13-14, 25-26, 28). Both Lieutenant Hughes and Mrs. Honn had been drinking, but neither was intoxicated (R. 20-21, 29, 36). They were looking for a

friend, and also intended to get some ice cream at the restaurant, for a sick person (R. 13, 21, 30, 36). Lieutenant Hughes testified that immediately after he had parked, the accused called from the car in which he was sitting, "Hey, soldier, move your car," or words to that effect (R. 14). Mrs. Honn testified that the accused called out, "Will you please move that G.D. car?" and that she called back, "Please watch your language because there happens to be a lady present." The accused thereupon said that he had just as soon hit her (R. 26). Lieutenant Hughes remarked to Mrs. Honn that he assumed he was "intruding on somebody's privacy", but he did not believe that accused overheard the remark (R. 14, 19). Regarding the condition of accused, Mrs. Honn testified, "I would not say he was drunk, he was merely belligerent" (R. 29).

Lieutenant Hughes and Mrs. Honn got out of his car on the right side, and she immediately engaged in an argument with the accused, who had also stepped out of his car. Lieutenant Hughes walked around in front of the cars and inspected them with the intention of moving his car if he had parked so near as to cause danger in backing out. The front fenders "were practically touching; but there seemed to be a foot and a half or two feet in the rear", and it appeared that there would be no danger in backing out (R. 14, 26). The two cars did not come in contact at all (R. 32). As Lieutenant Hughes turned from his inspection of the cars, intending to go into the restaurant, he was struck in the mouth by the accused with his fist. The blow fractured or knocked out two of Lieutenant Hughes' teeth, a front tooth and an eye tooth. He fell to the pavement, hitting his head on the pavement, and was rendered unconscious. However, he regained consciousness at "the scene", and got up, with the assistance of Mrs. Honn (R. 14-19, 26-28). He was quite dazed, and said to the accused, "God, man, why did you do that?" He did not offer to fight with the accused (R. 26, 33). The accused came forward with another officer and pointed at Lieutenant Hughes and said words to the effect: "Look at that man. He is drunk." The other officer agreed. After getting a drink of water in the restaurant, Lieutenant Hughes and Mrs. Honn drove away (R. 17-18).

4. For the defense, First Lieutenant Theodore Dammel testified that he had accompanied the accused to Santa Maria on the evening of 1 October and had gone into the restaurant ahead of accused, who was locking his car in the parking lot. The accused had not had anything to drink in the witness' presence at that time, and Lieutenant Dammel did not recall a woman being with the accused. While in the restaurant the witness heard a commotion outside, and came out and observed that Lieutenant Hughes had parked "fender to fender" with accused's car, and "had turned his front left wheel to a certain degree underneath the right fender" of accused's car. As Lieutenant Dammel approached, Lieutenant Hughes asked "who the hell" he was and what he wanted there.

The witness replied that he did not "want to start any further trouble." The accused asked Lieutenant Hughes "to please remove his car before he dented his fender, and he refused to do so. He said he would park his car 'any damn place' he pleased." Lieutenant Hughes and his woman companion were "very intoxicated." She threatened to slap the witness, and both she and Lieutenant Hughes told him he had no business there. Lieutenant Dammel saw no fight but heard "considerable argument." He did not see the accused strike Lieutenant Hughes, and the latter did not appear as though he had been struck. He saw Lieutenant Hughes back his car out and drive away with his woman companion (R. 58-67).

The accused, after having his rights as a witness explained to him, elected to make a sworn statement as to Specification 2 and to remain silent as to Specification 1 (R. 77, 88).

5. It is clearly established by the testimony of two competent witnesses that the accused wrongfully struck First Lieutenant Charles J. Hughes with his fist, as alleged in Specification 1 of the Charge. While the only witness for the defense failed to see the blow struck, it appears that he was not present all of the time during which the altercation took place. Viewed in its entirety, the testimony compels the conclusion that the accused became unduly incensed and antagonistic merely because Lieutenant Hughes parked his car in close proximity to that of accused, and that the accused struck Lieutenant Hughes without adequate provocation or justification. The evidence clearly supports the finding of guilty of Specification 1 of the Charge, and shows a violation of Article of War 96.

At the inception of the trial, the defense challenged the law member, Lieutenant Colonel William G. Taverner, for cause on the ground that "he had prior knowledge of the case" (R. 3). In support of the challenge the accused testified that prior to the trial the investigating officer went into the office of Lieutenant Colonel Taverner and remained there about two minutes, presumably for the purpose of ascertaining whether accused should be allowed to read a transcript of the testimony given at the preliminary investigation of the case (R. 4-6). Lieutenant Colonel Taverner testified that he knew nothing about the case which would influence his decision, and had no prejudice against the accused (R. 6-8). The court, in closed session and by secret written ballot, did not sustain the challenge (R. 8). No valid or legitimate ground for the challenge was shown by the evidence, and this action by the court was manifestly proper (MCM 1928, par. 58 e,f).

6. War Department records show that accused is 40 years of age and is married. A letter alleges that in April 1942 he was legally established as the father of a child born out of wedlock, to a woman other than his wife. He has completed two years of teachers' college. From 1927 to 1937 he served as an enlisted man in the Regular Army. In 1937 he worked for a short time as a metal inspector and press operator, and from 1937 to 1942 he was employed as a painter. He enlisted in the Army in July 1942, and on 9 April 1943 was commissioned

a second lieutenant in the Army of the United States upon graduation from the Provost Marshal General School at Fort Custer, Michigan. He was promoted to the grade of first lieutenant on 20 August 1943. In December 1944 the accused tendered his resignation from the service, without specification as to the character thereof, which was not favorably considered by the Secretary of War.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

Fletcher R. Andrews, Judge Advocate

Herbert B. Frederick, Judge Advocate

_____, Judge Advocate

SPJGQ-CM 278409 1st Ind

Hq ASF, JAGO, Washington, 25, D. C. JUN 25 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Flem W. Sleeth (0-1797731), Corps of Military Police.

2. Upon trial by general court-martial this officer was found guilty of wrongfully striking a fellow officer on and about the head and face with his fist, in violation of Article of War 96. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

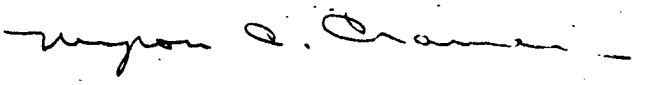
3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. I concur in that opinion.

At about 10:30 p.m., on 1 October 1944, First Lieutenant Charles J. Hughes, Medical Administrative Corps, accompanied by a woman, parked his automobile to the right of and "very close" to another automobile in which the accused and a woman were sitting, in front of a restaurant in Santa Maria, California. The accused at once assumed a belligerent attitude, and in disrespectful language ordered Lieutenant Hughes to move his car. An argument then ensued between the accused and the woman companion of Lieutenant Hughes, and all got out of the cars. Lieutenant Hughes walked around and inspected the positions of the cars, and it appearing to him that there would be no danger in backing out, he turned to go into the restaurant, at which time he was struck in the mouth by the accused with his fist. Lieutenant Hughes fell, hitting his head on the pavement, and was rendered temporarily unconscious. The blow also knocked out two of his teeth. The only witness for the defense, who apparently came up after the blow had been struck, testified that Lieutenant Hughes and his companion were very intoxicated and used disrespectful language toward him and the accused.

Papers accompanying the record of trial indicate that the accused received punishment under Article of War 104 for assaulting a warrant officer, on 3 October 1944, at Santa Maria, California. It also appears that accused uses intoxicating liquor intemperately. In December 1944, after his commanding officer had recommended him for reclassification, he tendered his resignation from the service, without specification as to

the character thereof. His resignation was "not favorably considered" by the Secretary of War. I recommend that the sentence be confirmed and carried into execution.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



MYRON C. CRAMER
Major General
The Judge Advocate General

2 Incls
1 Rec of Trial
2 Form of Action

(Sentence confirmed. G.C.M.O. 312, 7 JULY 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGH-CM 278547

23 APR 1945

UNITED STATES	INFANTRY REPLACEMENT TRAINING CENTER
v.	Trial by G.C.M., convened at Camp Roberts, California, 23 March 1945. Dismissal and confinement for two (2) years. Disciplinary Barracks.
Second Lieutenant ALBERT J. WOOD (0-1185160), Infantry.	

OPINION of the BOARD OF REVIEW
TAPPY, GAMBRELL and TREVETHAN, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 95th Article of War
(Finding of not guilty)

Specification: (Finding of not guilty)

CHARGE II: Violation of the 96th Article of War

Specification: In that Second Lieutenant ALBERT J. WOOD, Infantry, Company D, 78th Infantry Training Battalion, Camp Roberts, California, did, at San Luis Obispo, California, on or about 11 November 1944, wrongfully, unlawfully and bigamously marry, take and have for his wife, one Gladys Ostini, he, the said Second Lieutenant ALBERT J. WOOD, having at the time of said marriage to Gladys Ostini, a lawful wife then living, to wit, Marilyn B. Wood.

The accused pleaded not guilty to all Charges and Specifications. He was found not guilty of Charge I and its Specification and guilty of Charge II and its Specification. No evidence of any previous convictions

was introduced. He was sentenced to dismissal and confinement for two years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 48.

3. On 20 November 1942 accused married Marilyn Schneider at Milwaukee, Wisconsin, who after her marriage was known as Marilyn B. Wood (R. 2, 13; Pros. Exs. 1, 2). Mrs. Wood testified by deposition that she never at any time instituted divorce proceedings against accused nor notified him that she had taken or was taking any such action nor received notice that any such proceedings were pending against her (R. 13; Pros. Ex. 1). On 11 November 1944 accused was married to Gladys Ostini at San Luis Obispo, California. In his application for a marriage license accused stated that he had been divorced (R. 14; Pros. Ex. 3).

Colonel Gregory Hoisington testified that in December 1944 he investigated accused's discontinuance of an allotment to his wife "in Wisconsin" and at that time accused had agreed to make provisions for her. On none of the numerous occasions when Colonel Hoisington talked with accused about this matter did the latter make any reference to his second wife except at the time of their last conversation when the colonel was making inquiries as to whether accused had carried out his agreement. It was then that Colonel Hoisington learned from accused's company commander of accused's second marriage. When he confronted him with this information accused stated that he had been divorced from his first wife. Asked for proof of this divorce, accused stated that it was contained in a letter - which he could not produce - from a lawyer whose name he could not remember (R. 7, 9, 12).

4. Accused after being advised of his rights elected to be sworn and testify in his own behalf. After outlining his career in the Army, accused stated that he had met Marilyn Schneider in June 1941 and "went rather steady with her" until he entered the service on 30 January 1942. While home on furlough in May 1942 he had sexual relations with her. On 1 November 1942 she notified him that she was pregnant and that he was the father of her unborn child. Accused secured an emergency furlough and went to Milwaukee, Wisconsin, where, after consulting an attorney, he married Miss Schneider on 20 November 1942. His reason for consulting an attorney was that she had told him that he was not the only man with whom she had had sexual relations. In fact, the baby was born on 17 March 1943, some 9½ to 10 months after 2 June 1942 the last time accused possibly could have had intercourse with her. After the marriage accused returned to duty and did not see his wife again until May 1943. At that time relations between the two were not harmonious and she mentioned the possibility of obtaining a divorce. Accused told her that he was agreeable to that proposition. In October 1944 accused received a letter from an attorney

in Milwaukee stating that his wife had been granted a divorce from him without any award of alimony; that it would become final on 4 or 5 November; and that "all the official papers" would be sent to him as soon as possible. Immediately after receiving this letter accused discussed it with some brother officers in the orderly room and with a Sergeant Kral in the mess hall. Relying on this information he married Miss Gladys Ostini whom he introduced to members of the post as his wife and with whom he lived openly as such. He had talked with the Regimental Adjutant, Captain Murphy, about the discontinued allotment and had agreed to send some money home to support his child. Accused assumed that Captain Murphy knew he was divorced because accused had permission to live off the post and his address and telephone number were posted prominently on the bulletin board (R. 21-25).

On cross-examination and examination by the court accused stated that he had never instituted divorce proceedings against his wife. He had never given written consent to her procuring a divorce but he had told her that he would approve any action she cared to take in that respect. He received the letter from the attorney in Milwaukee on 20 October 1944 and since then there had been no further communication from him about the divorce. He failed to take any action when the "official papers" the letter referred to were not forthcoming because he was too busy. After he realized charges were going to be preferred against him he wired an attorney in Milwaukee and asked him to investigate the matter. It was stipulated by and between the prosecution, the defense, and the accused that if Howard A. Tell, an attorney of Milwaukee, Wisconsin, were present in court he would testify that as a result of receiving a communication from accused on 13 March 1945 he dispatched a telegram to accused as follows: "No record of divorce in Milwaukee County. May be in adjoining counties. Awaiting reply to letter. Mail particulars to me and wire wife's address if in Milwaukee." On 19 March 1945 in an endeavor to clarify the situation he sent another telegram but the record does not reveal to whom. Up to noon of the day of the trial - 23 March 1945 - he had not received a reply to this last telegram. Accused tried to cancel his allotment to his first wife in November 1944 but the cancellation did not become effective until 31 December. In January 1945 when he discussed the question of sending money to his first wife with Captain Murphy - he had never discussed it with Colonel Hoisington - he stated that he intended to send her the same amount he had been sending her (R. 25-29).

First Sergeant Lawrence F. Winslow testified that during the latter part of October 1944 he overheard accused say in the orderly room that he had been divorced. The witness stated accused had mentioned a letter during this conversation but he could not say that accused explicitly referred to the letter as the basis for his statement that he had been divorced (R. 16, 17).

Staff Sergeant John C. Kral testified that during the month of October 1944 accused had a conversation with him in the mess hall and told him that he had a letter from a lawyer stating that his divorce was final and that he was free to remarry. At that time accused had a letter in his hand and referred to that as he spoke (R. 18).

Mrs. Gladys Wood testified that she was accused's wife. She had known him since 7 October. The first time she met him accused told her that he was married but that he was being divorced. About the latter part of October he told her that he had received a letter from an attorney in Milwaukee, Wisconsin, informing him that he had been divorced. During the month of February accused told her he had sent $30 to his child (R. 19, 20).

5. It has been held that the offense of bigamy is committed under Article of War 96 when one party enters into a contract of marriage while a former marriage of that party still exists undissolved and the spouse of that marriage remains alive (CM 256886, Wilber, 36 B.R. 373). However, following the rule prevailing in a minority of the civil jurisdictions in this country, The Judge Advocate General has apparently adopted the view that accused's belief that the first marriage has been terminated is a defense to a charge of bigamy if it is an honest belief based upon reasonable grounds or if accused has exercised "reasonable diligence to ascertain the truth" of the facts on which his belief is founded (Dig. Op. JAG, 1912-40, sec. 454 (18); CM 245510, Carusone, 29 B.R. 195; CM 272642, Bailey). Even according full credence to the testimony introduced by the defense, it is apparent that the only basis accused could have had for believing that his first marriage had been terminated was information contained in an alleged letter, not produced at the trial, written by a lawyer whom accused did not know and with whom he had no previous relations, plus the fact that his wife had earlier mentioned the possibility of suing for divorce. He had never filed any written consent to such divorce nor had he been served with papers in any such action, received any official documents whatsoever relative thereto, nor sought official confirmation as to whether or not a decree had been entered. Under such circumstances it is the opinion of the Board of Review that accused's belief, however honestly held, was not based upon reasonable grounds that his marriage had been terminated nor did he exercise reasonable diligence to ascertain whether or not a divorce had in fact been granted.

It should also be observed that the prosecution introduced evidence which was not consistent with accused's testimony concerning the receipt of a letter about a divorce. In the first place his wife had never sued for divorce so it is hardly believable that he would have received any such letter. Secondly, a month after his second marriage

he was questioned by Colonel Hoisington concerning his discontinuance of an allotment to his wife in Wisconsin and accused not only agreed to make provision for her but made no mention of a divorce from her. In the face of such evidence the court was amply warranted in disbelieving accused's testimony concerning the receipt of the alleged letter. The record fully sustains the findings of guilty of the Specification and the Charge.

6. The records of the War Department show that accused is married and is 25 years of age. He is a high school graduate. Prior to entering the Army he worked as a clerk, a farm hand, and a machine operator. He enlisted in the Army on 1 January 1942 and was assigned to the Field Artillery. On graduation from the Field Artillery School on 2 September 1943 he was commissioned a second lieutenant, Army of the United States, and reported for active duty the same day.

7. The court was legally constituted and had jurisdiction of the accused and the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The sentence imposed is authorized upon conviction of a violation of Article of War 96.

Thomas H. Duffy, Judge Advocate

William H. Dambrell, Judge Advocate

Robert C. Trevethan, Judge Advocate

SPJGH-CM 278547 1st Ind

Hq ASF, JAGO, Washington 25, D. C.

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Albert J. Wood (0-1185160), Infantry.

2. Upon trial by general court-martial this officer was found guilty of bigamy, in violation of Article of War 96. He was sentenced to dismissal and confinement for two years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I concur in that opinion. On 20 November 1942 accused married Marilyn Schneider at Milwaukee, Wisconsin. On 11 November 1944, while Marilyn Wood was still alive and undivorced from accused, he married Gladys Ostini at San Luis Obispo, California. In his application for a license in connection with this latter marriage accused stated that he was divorced. In December 1944 accused's regimental commander commenced an investigation of accused's discontinuance of an allotment to his lawful wife, Mrs. Marilyn Wood, at which time accused agreed to make financial provisions for her, making no mention of any divorce. Finally this officer learned of accused's second marriage and confronted accused with this fact on 21 February 1945. Accused then stated that he had been divorced from Mrs. Marilyn Wood. When asked for proof of this accused stated that it was contained in a letter, which he could not produce, and which he claimed he had received 20 October 1944, from a lawyer whose name he could not remember.

I recommend that the sentence be confirmed and carried into execution and that the Federal Reformatory, El Reno, Oklahoma, be designated as the place of confinement.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

Myron C. Cramer

2 Incls
1. Record of trial
2. Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed. G.C.M.O. 229, 13 June 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGN-CM 278548

UNITED STATES v. Technician Fourth Grade CARLISLE J. O'NEAL (19046071), Medical Detachment SCU 1986, Birmingham General Hospital, Van Nuys, California.	HEADQUARTERS, CAMP HAAN NINTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Van Nuys, California, 20 March 1945. Dishonorable discharge and confinement for five (5) years. Federal Reformatory, El Reno, Oklahoma.

HOLDING by the BOARD OF REVIEW
LIPSCOMB, O'CONNOR and MORGAN, Judge Advocates

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1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 93rd Article of War.

Specification: In that Tec 4 Carlisle J. O'Neal, Medical Detachment SCU 1986, Birmingham General Hospital, Van Nuys, California, did at or near the city of Glendale, State of California, on or about 15 February 1945, with intent to commit a felony, viz., sodomy, commit an assault upon Barbara Hurtel, by wilfully and feloniously choking the neck of the said Barbara Hurtel with his hands.

CHARGE II: Violation of the 96th Article of War.

Specification: In that Tec 4 Carlisle J. O'Neal, Medical Detachment SCU 1986, Birmingham General Hospital, Van Nuys, California, did, at or near the city of Glendale, State of California, on or about 15 February 1945, attempt to commit

> the crime of sodomy upon Barbara Hurtel, by feloniously, and against the order of nature, attempting to have carnal connection by mouth with the sexual organs of the said Barbara Hurtel, a human being.

He pleaded not guilty to, and was found guilty of, both Charges and the Specifications thereunder. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for five years. The reviewing authority approved the sentence, designated the Federal Reformatory, El Reno, Oklahoma, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. For the purposes of this opinion it is sufficient to observe that the evidence for the prosecution establishes that at the time and place alleged in the two Specifications set forth above the accused made a violent attack upon the young woman named therein with the intent of inserting his tongue into her sexual organ, an act referred to in medical phraseology as cunnilingus. This was the only form of sexual perversion attempted by him.

4. The Specification of Charge II alleges that the accused attempted "to commit the crime of sodomy upon Barbara Hurtel, by feloniously, and against the order of nature, attempting to have carnal connection by mouth with the sexual organs of the said Barbara Hurtel, a human being". This offense is laid under the 96th Article of War.

Sodomy is defined in the present Manual for Courts-Martial, as follows:

> "Sodomy consists of sexual connection with any brute animal, or in sexual connection, by rectum or by mouth, by a man with a human being. Penetration alone is sufficient, and both parties may be liable as principals" (MCM, 1928, par. 149k).

In view of this broad definition which has been promulgated as descriptive of perverted sexual offenses against military law the accused's attempt to commit cunnilingus upon Barbara Hurtel was clearly "conduct of a nature to bring discredit upon the military service" within the meaning of Article of War 96. The evidence is legally sufficient, therefore, to sustain the findings of guilty of the Specification of Charge II and Charge II.

5. On the other hand, the Specification of Charge I, without describing the act of sodomy, alleges that the accused did "with intent to commit a felony, viz., sodomy, commit an assault upon Barbara Hurtel, by wilfully and feloniously choking the neck of the said Barbara Hurtel with his hands". In order to determine whether or not the offense established as having

been attempted was "a felony, viz., sodomy" we must examine the meaning of both the words "felony" and "sodomy".

The Manual for Courts-Martial states that:

> "The term 'felony' includes, among other offenses so designated at common law, murder, manslaughter, arson, robbery, rape, sodomy, mayhem, and larceny (irrespective of value)" (MCM, 1928, par. 149d).

In the terms of the above definition we must discover whether the particular offense proved to have been attempted was, in legal contemplation, the common law felony of sodomy which was alleged. As a companion question we must determine whether the evidence is legally sufficient to warrant the action of the reviewing authority in designating a federal reformatory as the place of confinement. As will hereafter be seen the answer to this latter question, the only answer which is vital to the legality of the sentence, as approved and implemented by the reviewing authority, will also serve to answer the former question.

The determination of whether any person under the sentence of a court-martial may be punished by confinement in a penitentiary is controlled by the provisions of Article of War 42, as follows:

> "Except for desertion in time of war, repeated desertion in time of peace, and mutiny, no person shall, under the sentence of a court-martial, be punished by confinement in a penitentiary unless an act or ommission of which he is convicted is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by some statute of the United States, of general application within the continental United States, excepting section 289, Penal Code of the United States, 1910, or by the law of the District of Columbia, * * *".

Since there is no federal statute of general application punishing the offense of sodomy, cunnilingus, or assault "with intent to commit a felony, viz., sodomy", the law of the District of Columbia must be looked to in order to determine whether penitentiary confinement is authorized for the offense proved in the present case. As to "the law of the District of Columbia" remaining in effect at this time the code of the District of Columbia provides, as follows:

> "The common law, all British statutes in force in Maryland on February 27, 1801, the principles of equity and admiralty, all general Acts of Congress not locally inapplicable in the District of Columbia, and all Acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States,

in force in the District of Columbia on March 3, 1901, shall remain in force except in so far as the same are inconsistent with, or are replaced by, subsequent legislation of Congress. (Mar. 3, 1901, 31 Stat. 1189, ch. 854, sec. 1)" (Title 49, sec. 301, D. C. Code).

In this connection it should be observed that punishment for offenses not covered by provisions of the Code of the District of Columbia are provided for, as follows:

"Whoever shall be convicted of any criminal offense not covered by the provisions of any section of this code, or of any general law of the United States not locally inapplicable in the District of Columbia, shall be punished by a fine not exceeding one thousand dollars or by imprisonment for not more than five years, or both. (Mar. 3, 1901, 31 Stat. 1337, ch. 854, sec. 910" (Title 22, Sec. 107, D. C. Code).

Since neither sodomy nor the offense of cunnilingus is mentioned in the Code of the District of Columbia, it is necessary to interpret the meaning of the words in the above statute incorporating into the law of the District of Columbia "the common law" and "all British statutes in force in Maryland on February 27, 1801". In Burdick et al. v. Burdick et. al., 33 F. Supp. 921, the District Court of the United States for the District of Columbia stated that:

"I am of the opinion that the meaning of the expression 'all British statutes in force in Maryland on the twenty-seventh day of February, eighteen hundred and one' is ascertainable from an examination of the Maryland Declaration of Rights of 1776. That declaration, in Sec. 3, provided that the inhabitants of Maryland were entitled to 'the benefit of such of the English statutes, as existed at the time of their first emigration, and which, by experience, have been found applicable to their * * * circumstances.', and also to 'the benefit * * * of such others as have been since made in England, or Great Britain, and have been introduced, used and practised by the courts of law or equity.'

* * *

"I therefore conclude that the common law referred to by Congress in the 1901 Code, was the same common law referred to by the Court of Appeals of the District four years before, namely, the common law of England as it existed in Maryland in 1801 and as otherwise limited by the opinion in DeForest v. United States, supra. This common law applicable to the District of Columbia is therefore not identical with the common law of England. * * *".

Since no British statute is applicable to the present problem, only the common law, as interpreted and applied in Maryland in 1801, need be ex-

been attempted was "a felony, viz., sodomy" we must examine the meaning of both the words "felony" and "sodomy".

The Manual for Courts-Martial states that:

> "The term 'felony' includes, among other offenses so designated at common law, murder, manslaughter, arson, robbery, rape, sodomy, mayhem, and larceny (irrespective of value)" (MCM, 1928, par. 149d).

In the terms of the above definition we must discover whether the particular offense proved to have been attempted was, in legal contemplation, the common law felony of sodomy which was alleged. As a companion question we must determine whether the evidence is legally sufficient to warrant the action of the reviewing authority in designating a federal reformatory as the place of confinement. As will hereafter be seen the answer to this latter question, the only answer which is vital to the legality of the sentence, as approved and implemented by the reviewing authority, will also serve to answer the former question.

The determination of whether any person under the sentence of a court-martial may be punished by confinement in a penitentiary is controlled by the provisions of Article of War 42, as follows:

> "Except for desertion in time of war, repeated desertion in time of peace, and mutiny, no person shall, under the sentence of a court-martial, be punished by confinement in a penitentiary unless an act or ommission of which he is convicted is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by some statute of the United States, of general application within the continental United States, excepting section 289, Penal Code of the United States, 1910, or by the law of the District of Columbia, * * *".

Since there is no federal statute of general application punishing the offense of sodomy, cunnilingus, or assault "with intent to commit a felony, viz., sodomy", the law of the District of Columbia must be looked to in order to determine whether penitentiary confinement is authorized for the offense proved in the present case. As to "the law of the District of Columbia" remaining in effect at this time the code of the District of Columbia provides, as follows:

> "The common law, all British statutes in force in Maryland on February 27, 1801, the principles of equity and admiralty, all general Acts of Congress not locally inapplicable in the District of Columbia, and all Acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States,

in force in the District of Columbia on March 3, 1901, shall remain in force except in so far as the same are inconsistent with, or are replaced by, subsequent legislation of Congress. (Mar. 3, 1901, 31 Stat. 1189, ch. 854, sec. 1)" (Title 49, sec. 301, D. C. Code).

In this connection it should be observed that punishment for offenses not covered by provisions of the Code of the District of Columbia are provided for, as follows:

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Since neither sodomy nor the offense of cunnilingus is mentioned in the Code of the District of Columbia, it is necessary to interpret the meaning of the words in the above statute incorporating into the law of the District of Columbia "the common law" and "all British statutes in force in Maryland on February 27, 1801". In Burdick et al. v. Burdick et. al., 33 F. Supp. 921, the District Court of the United States for the District of Columbia stated that:

"I am of the opinion that the meaning of the expression 'all British statutes in force in Maryland on the twenty-seventh day of February, eighteen hundred and one' is ascertainable from an examination of the Maryland Declaration of Rights of 1776. That declaration, in Sec. 3, provided that the inhabitants of Maryland were entitled to 'the benefit of such of the English statutes, as existed at the time of their first emigration, and which, by experience, have been found applicable to their * * * circumstances.', and also to 'the benefit * * * of such others as have been since made in England, or Great Britain, and have been introduced, used and practised by the courts of law or equity.'

* * *

"I therefore conclude that the common law referred to by Congress in the 1901 Code, was the same common law referred to by the Court of Appeals of the District four years before, namely, the common law of England as it existed in Maryland in 1801 and as otherwise limited by the opinion in DeForest v. United States, supra. This common law applicable to the District of Columbia is therefore not identical with the common law of England. * * *".

Since no British statute is applicable to the present problem, only the common law, as interpreted and applied in Maryland in 1801, need be ex-

amined in order to derive the meaning of sodomy as incorporated into common law of the District of Columbia.

An examination of the decisions of the Maryland courts reveals only one case dealing with the crime of sodomy. In Davis v. State, 3 Harris & Johnson, 154 (1810), the Maryland court held that an indictment for assaulting and attempting to commit sodomy on a young man was within the act of 1793 and that judgment could be had "either at common law, or under the Act of Assembly, that the conclusion contra forman statuti was not improper" and that it was unnecessary to lay the "carnaliter cognovit in the indictment". The concurring judge stated that:

> "The crime of sodomy is too well known to be misunderstood, and too disgusting to be defined farther than by merely naming it."

It is apparent that for the present purpose the above opinion does no more than to indicate that sodomy was recognized as an offense under the common law of Maryland. The court's regrettable assumption that the crime was too well known to be misunderstood and the excessive modesty displayed in not defining it leaves us dependent upon other authorities for a definition of the offense as understood at common law.

Although many of the authorities, like the Maryland court, have declined to define sodomy or have defined it in general terms only, modern treatises on criminal law state that at common law, "Sodomy proper is the carnal copulation of human beings in other than the natural manner, that is, 'against nature' and per anum" (Wharton's Criminal Law, sec. 755; see also to the same effect Miller on Criminal Law, sec. 141; Clark & Marshall Crimes, 4th Ed. sec. 463; Ginsberg, Maryland Criminal Law and Procedure, p. 264; Index of Maryland Statutes and cases on Criminal Law, 3rd Ed., Strahorn Jr. p. 19; Words and Phrases, Vol. 39, pp 418-420; 2 Bishop Criminal Law, Sec. 1191-1196; McClain's Criminal Law, Vol. 2, p. 56, Sec. 1153; Clark's Criminal Law, Sec. 84, p. 192; Archibald's Criminal Practice and Pleading (8th Edition), Vol. 1, p. 1015). It should be observed that the 1917 edition of the Manual for Courts-Martial adopted Wharton's common law definition of sodomy by quoting it, as follows:

> "Sodomy consists in sexual connection with any brute animal, or in sexual connection per anum, by a man with any man or woman. (Wharton, vol. 2, p. 538)."

In addition, apparently for the sake of clarity, that edition of the Manual stated further that:

> "Penetration of the mouth of the person does not constitute this offense." (MCM, 1917, p. 271).

The 1921 edition of the Manual for Courts-Martial similarly said that:

"Neither the Federal Penal Code nor the Code of the District of Columbia defines sodomy. Courts-martial are therefore governed by the common-law definition of this offense.

"Sodomy at common law consists in sexual connection with any brute animal, or in sexual connection, per anum, by a man with any man or woman. (Wharton, vol. 1, p. 965)."

This last sentence was followed in the 1921 edition by the assertion that:

"Penetration of the mouth also constitutes this offense." (MCM, 1921, par. 443, p. 439).

These words represented the repetition of an administrative innovation which was first promulgated by The Judge Advocate General in 1918 and which was intended, for the purposes of military law, to enlarge the concept of sodomy as it existed at common law. In defining an assault with intent to commit sodomy, however, the same Manual describes that offense as it existed at common law, as follows:

"An assault with intent to commit this offense consists of an assault on a human being with intent to penetrate his or her person per anum." (MCM, 1921, supra).

Wharton in his discussion of sodomy explains its nature and origin, as follows:

"The crime derives its name from the City of Sodom, the unfortunate 'city of the plains' of Palestine, where these bestial practices were first introduced and became so universally prevelant that strangers sojourning within its gates were not secure from assault and outrage" (Wharton, supra, sec. 754).

The background for the common law concept of sodomy is found in the following passages in the Bible:

"4 But before they lay down, the men of the city, even the men of Sodom compassed the house round, both old and young, all the people from every quarter:
5 And they called unto Lot, and said unto him, Where are the men which came in to thee this night? bring them out unto us, that we may know them.
6 And Lot went out at the door unto them, and shut the door after them
7 And said, I pray you, brethern, do not so wickedly.

> 8 Behold now, I have two daughters which have not known man; let me, I pray you, bring them out unto you, and do ye to them as is good in your eyes: only unto these men do nothing; for therefore came they under the shadow of my roof" (Genesis 19: 4 to 8).
>
> * * *
>
> "13 If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them" (Leviticus 20: 13).

The leading English case of Rex v. Jacobs, 1817, 168 Reprint, 830, reflects the concept of the Biblical offense associated with the city of Sodom by holding that the act of an accused in inserting his penis into the mouth of a seven year old boy was not sodomy.

Although the decisions of the state courts, which in every case examined were concerned with the interpretation of a local statute, defy any precise generalization, the great majority of them clearly recognize that at common law sodomy was defined as carnal copulation per anum and did not extend to other forms of sexual perversion. In Munoz v. State, 163 Texas C.R. 439, 281 S.W. 857, the Texas Court of Criminal Appeals in passing upon an act similar to the one described in the English case cited above, stated that:

> "* * * however vile and detestable the act may have been it does not come within the definition of 'sodomy' as known to the common law and adopted by legislative enactment in our state. Article 524, P.C. 1925. Such has been the uniform holding of this court."

In Wise v. Commonwealth, 115 S.E. 508, the Supreme Court of Virginia, after reviewing the perverted act committed per os, reversed the conviction of the lower Virginia court on the ground that the offense was not sodomy and stated that:

> "According to the clear weight of authority, the common-law definition, unless aided by statute, does not include carnal copulation per os."

In State v. Murry, 66 S. 963, the accused was convicted under an indictment alleging the commission of buggery, but the evidence showed that he had committed an unnatural offense per os. In reversing the judgment of the lower court, the Supreme Court of Louisiana stated that:

> "* * * it is well settled that the offense committed with the male sexual organ and the mouth, that is, the act called 'fellatio' in medical jurisprudence, was never regarded at common law as the 'crime against nature', which meant only

'buggery' or 'sodomy'.

"And it is also obvious that, as the section of the Revised Statutes did not define any crime against nature, but only denounced that crime known in the common law as 'buggery' or 'sodomy', the amendment of 1896 was adopted in order to amend and enlarge the common-law definition of the crime against nature so as to include the act called 'fellatio', and perhaps that other perversion called 'cunnilingus', committed with the mouth and the female sexual organ."

In Koontz v. People, 263 P. 19, the Supreme Court of Colorado stated that:

"This section recognizes and adopts the common-law designation of sodomy as the infamous crime against nature. But, even if it were otherwise, where the statute does not define a crime, but merely gives to it its common-law name or designation, resort must be had to the common law to ascertain what acts constitute the crime in question. State v. Johnson, 44 Utah, 18, 137, P. 632. At common law, sodomy, 'the infamous crime against nature', was committed only by penetration per anum; penetration per os did not constitute the crime."

In State v. Whitmarsh, 128 N.W. 580, the Supreme Court of South Dakota in affirming a conviction for a sexual offense committed per os nevertheless recognized that the offense was being punished under a state statute which was broader in meaning than sodomy at common law. In its decision the court stated that:

"It must be conceded that under the common law sodomy could not be committed by means of the mouth. * * * In Honselmann v. People, 168 Ill. 175, 48 N.E. 305, the court says: * * * The claim is that the evidence must prove the crime of sodomy, and that the crime against nature, as defined in our statute, embraces nothing but sodomy, or buggery, as denominated in the English statute. With this we cannot agree. While the 'crime against nature' and 'sodomy' have often been used as synonymous terms, paragraph 279 of our Criminal Code, defining infamous crimes, plainly shows that the Legislature included in the crime against nature other forms of the offense than sodomy or buggery."

A similar statement was made in State v. Farris, 178 N.W. 361, wherein the Supreme Court of Iowa stated that:

"But our statute, section 4937, as later defined by section 4937a, Code Supp., is broader than the definition at common law."

As previously indicated, it is also significant to observe that the Manuals for Courts-Martial, like the statutes of Maryland and other states, have broadened the common law definition of sodomy so as to condemn all forms of sexual perversion. The first amendment to the common law crime of sodomy occurred in 1918 when an administrative supplement to the Manual was issued providing that "penetration of the mouth of the person also constitutes this offense". The second amendment which further enlarged the so-called crime of sodomy was expressly incorporated in the Manual of 1921. The third amendment was the broad definition of sodomy promulgated in the Manual for 1928. It must not be overlooked, however, that the changes in the definition of sodomy both in 1918 and in 1921 clearly recognized that at common law the definition of sodomy was confined to sexual connection per anum. Obviously, these changes were administratively introduced because it was recognized that a failure to punish all forms of sexual perversion would be prejudicial to the military service.

The definition of common law sodomy contained in the 1917 and 1921 Manuals for Courts-Martial was not observed by the Board of Review in 2 B.R. 17, Hume. In that case the offense of fellatio was held to be included within the common law definition of sodomy, within the meaning of Article of War 93, and to be punishable by confinement in a United States Penitentiary. This interpretation appears to have been based largely upon the case of Glover vs. State, 101 N.E. 629, in which the Supreme Court of Indiana was primarily concerned with the application of a very broad statute which was aimed not only at common law sodomy but at all forms of sexual perversion including even the offense of aiding and abetting masturbation. Although that court construed the word sodomy as having a very broad meaning at common law, the problem before it was one of statutory interpretation as is shown by the court's conclusion, as follows:

"*** In view of this fact, we think we are left free to conclude that our Legislature, when it passed the act of 1905 (Burns' Amm. St. 1908, p. 2374), supra, chose rather the broad definition of the crime, which would include those abominations within the mischief of the law, rather than the narrow one which without reason would exclude from punishment a perpetrator of what might well be considered the vilest and most degenerate of all the acts within the inclusion of the broad definition. The correctness of this conclusion is made clear by the fact that by the last clause of section 2374 the act of enticing, alluring, instigating, or aiding any person under the age of 21 to commit masturbation or self-pollution is also made the crime of sodomy. This was never within the broadest definition of sodomy at common law."

Not one of the authorities cited by the Indiana court specifically declares that fellatio is common law sodomy. Indeed, Rex vs. Jacobs, (1817) I Rus. Ry. 331, the only decision cited which is actually in point, expressly holds to the contrary.

The decision in the Hume case, supra, was followed by the Board of Review in CM 230894, Hazelwood. Subsequent to his conviction Hazelwood instituted habeas corpus proceedings in the United States District Court for the Western District of Texas and succeeded in obtaining his release from confinement. In its opinion the court held, among other things, that the offense of fellatio was not included within the definition of sodomy at common law.

The Board of Review is of the opinion that the great weight of authority, including the Manuals for Courts-Martial 1917 and 1921, supports the view that sodomy at common law was limited to sexual connection per anum and did not include fellatio. Although the latter part of this conclusion may be questioned, it should be observed that there are substantial differences between the offense of fellatio and the offense of cunnilingus. Because of these differences and in the light of the authorities cited, the Board of Review is of the opinion that the law of the District of Columbia, which is dependent upon the common law definition of sodomy as it existed in Maryland in 1801, does not include within that definition the offense known as cunnilingus, the offense intended in the present case to be accomplished by the accused. It necessarily follows that confinement of the accused in an institution of a penitentiary type such as a federal reformatory is not authorized.

In working on the unpleasant subject of sodomy the Board of Review has had ample reason to regret that Article of War 42 requires those who enforce military law to examine in turn three separate systems of jurisprudence, namely, the law of the district of Columbia, the common law of Maryland in 1801, and the basic common law of England in order to determine whether a particular offense which is violative of military law may be punished by confinement in a penitentiary. It is hoped that a future amendment of the Articles of War may provide a simple rule for determining the lawful place of confinement.

6. Since the Specification of Charge I alleges that the accused did, "with intent to commit a felony, viz., sodomy, commit an assault upon Barbara Hurtel, by wilfully and feloniously choking the neck of the said Barbara Hurtel with his hands", and since the evidence shows that the act intended by the accused was not a "felony, viz., sodomy" either at common law or under the federal law, the record is legally insufficient to sustain that particular allegation of the Specification. With the words, "with intent to commit a felony, viz., sodomy", deleted from the findings there remains the findings that the accused committed an assault and battery, a lesser included offense, violative of Article of War 96.

7. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Specification of Charge I and Charge I as involves a finding of guilty of that Specification omitting therefrom the words "with intent to commit a felony, viz., sodomy", in violation of Article of War 96; legally sufficient to support the other findings; and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years at a place other than a penitentiary or federal reformatory.

Abner E. Lipscomb, Judge Advocate.

Robert J. Conner, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGQ - CM 278548 1st Ind

Hq ASF, JAGO, Washington 25, D. C. JUL 1 8 1945

TO: The Secretary of War

1. Herewith transmitted for your action under Article of War 50½ are the record of trial and the holding of the Board of Review in the case of Technician Fourth Grade Carlisle J. O'Neal (19046071), Medical Detachment SCU 1986, Birmingham General Hospital, Van Nuys, California.

2. I do not concur in the holding of the Board of Review, and, for the reasons hereinafter set forth, am of the opinion that the record of trial is legally sufficient to support the findings and sentence and to authorize confinement in a Federal reformatory.

3. The Board of Review does not question the sufficiency of the record to support the findings of guilty of Charge II and the Specification thereof, and further reference to that Specification and Charge is unnecessary. Charge I is laid under Article of War 93, and the Specification thereof alleges an assault by accused upon one Barbara Hurtel, "with intent to commit a felony, viz, sodomy". The evidence established that the accused made a violent attack upon Miss Hurtel with the intent of inserting his tongue into her sexual organ, an act referred to in medical jurisprudence as cunnilingus.

4. Article of War 42 authorizes penitentiary confinement for an act recognized as an offense of a civil nature and punishable by penitentiary confinement by the law of the District of Columbia. Title 22, Section 503, District of Columbia Code, authorizes penitentiary confinement for an assault "with intent to commit any other offense which may be punished by imprisonment in the penitentiary." Although there is no District of Columbia statute denouncing sodomy as an offense, it is a common law offense and, as such, punishable by confinement in the penitentiary under the provisions of Title 22, Section 107, District of Columbia Code, quoted on page 4 of the Board of Review's holding (See also MCM 1928, par. 90a). Hence, penitentiary confinement is authorized by the law of the District of Columbia for an assault with intent to commit sodomy.

Although conceding that sodomy is a felony and punishable by penitentiary confinement under the law of the District of Columbia, the Board of Review takes the position that the act known as cunnilingus does not come within the scope of the crime of sodomy at common law, and that there being no applicable statute in the Federal Code or District of Columbia Code, the evidence does not prove an intent to commit sodomy. As a consequence, the Board holds the record of trial legally sufficient to support only so much of the findings of

guilty of Charge I and the Specification thereof as involves a finding of guilty of that Specification omitting the words "with intent to commit a felony, viz, sodomy", in violation of Article of War 96. The Board holds further that confinement in a Federal reformatory is not authorized.

Examination of a large number of authorities discloses a high degree of uncertainty as to exactly what forms of sex perversion constitute common law sodomy. There is no Federal or District of Columbia decision throwing any light on the question. However, the Manual for Courts-Martial declares that sodomy "consists of sexual connection with any brute animal, or in sexual connection, by rectum or by mouth, by a man with a human being" (MCM 1928, p. 177). Substantially the same definition has been in effect since the publication of the 1917 Manual for Courts-Martial as corrected to 1 August 1918.

There is nothing in the foregoing definition indicative of an intent to limit the offense to any particular types of sexual connection, and this office has held on a number of occasions that cunnilingus comes within the scope of the offense under consideration. Such an interpretation is entirely proper in view of the confused state of the civil cases and the nature of the act of cunnilingus. Connection between the tongue of the male and the sexual organ of the female is no less a sexual connection than one between the male organ and the mouth of the female. The two acts are equally revolting and merit the same type of punishment and confinement. In the absence of controlling authority or Congressional expression to the contrary, it is my opinion that the definition contained in the Manual for Courts-Martial and the settled policy of this office should govern and that the act involved in the present case amounts to common law sodomy. As a consequence, confinement in a penitentiary or reformatory is authorized by Article of War 42 and the provisions of the District of Columbia Code cited above.

5. For the foregoing reasons I recommend that the findings and sentence, including the designation of the Federal Reformatory, El Reno, Oklahoma as the place of confinement, be confirmed and that the sentence be carried into execution.

6. Inclosed is a form of action designed to carry my recommendation into effect should it meet with your approval.

Myron C. Cramer

2 Incls
1 - Record of trial
2 - Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Findings and sentence, including designation of Federal Reformatory as the place of confinement confirmed). G.C.M.O. 410, 21 Aug 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGK
CM 278598

13 APR 1945

UNITED STATES v. First Lieutenant JOHN F. T. WHITE, (O-748119), Air Corps	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND. Trial by G. C. M., convened at Midland, Army Air Field, Midland, Texas, 12 March 1945. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
LYON, HEPBURN and MOYSE, Judge Advocates

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. Accused was tried upon the following Charge and Specification:

Charge: Violation of the 93rd Article of War.

Specification: In that First Lieutenant John F. T. White, Air Corps, did, at Midland Army Air Field, Midland, Texas, on or about 7 February 1945, feloniously take, steal, and carry away about one hundred and thirty-eight dollars ($138.00), lawful money of the United States, the property of First Lieutenant Joseph G. Hearn, and about seventy-five dollars ($75.00), lawful money of the United States, the property of Second Lieutenant Herbert Higginbotham, Jr.

He pleaded guilty to and was found guilty of the Charge and its Specification. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence, a. For the Prosecution:

Accused was in the military service of the United States at the time of the commission of the offense alleged in the Specification and at the time of the trial (R. 10, 25). He was a first lieutenant and Bombardier, recently returned from overseas combat service, stationed at Midland Army Air Field, Texas, and on 7 February 1945 was preparing to leave for San Antonio to enter preflight training as a pilot. He was quartered in Room

14, BOQ, 122 at the Midland Army Air Field, on the same floor with Lieutenants Joseph G. Hearn and Herbert Higginbotham, also returned combat bombardiers, who occupied together Room 10 (R. 6, 18).

On the evening of 7 February 1945, between 6:00 and 6:30, Lieutenants Hearn and Higginbotham and the accused were in a latrine immediately outside of the B.O.Q. in which they lived. They engaged in casual conversations, during which the accused complained about the fact that he was going to lose his flying pay while he was in preflight (R. 6, 18). Lieutenants Hearn and Higginbotham went back to their own room and shortly thereafter undressed preparatory to taking showers in the latrine. Lieutenant Hearn left his wallet, which contained about $138.00 in cash, on his bed (R. 7). Lieutenant Higginbotham left his wallet in the back pocket of his trousers with the flap buttoned, the trousers being left on his bed; his wallet contained about $75.00 in cash (R. 18).

Between 7:00 and 7:30 Lieutenants Hearn and Higginbotham were in the latrine taking shower baths (R. 6, 18). While there, Lieutenant Hearn noticed the accused through an upstairs window of their barracks as he passed by, walking on the same floor where their rooms were located (R. 11). As they walked back to their room, they passed the accused coming down the stairs (R. 6).

Lieutenant Hearn dressed and was about to leave when he looked for his wallet. He could not find it. He looked all around the room with some of his friends helping him, but still could not find the wallet. (R. 6) He and Lieutenant Higginbotham had an engagement in town. Lieutenant Higginbotham said that he would lend Lieutenant Hearn some money, but on taking his wallet out of his trouser pocket, found that all of the money which had been in the wallet was gone (R. 6, 19). They immediately reported the matter at Post Headquarters and to the Officer of the Day (R. 6, 19).

They went back to their barracks and continued to search for the money without success. They had several conferences with the Officer of the Day and the Officer of the Guard about the matter (R. 19). Because they thought the accused had acted strangely, they suspected him (R. 11). Shortly before 11:00 P.M., they went to Officers' Club No. 2, where they noticed the accused had been playing bridge with two other officers who roomed with him. They decided to go back to the accused's room with him when he went, which they did, arriving in the accused's room along with the other officers who roomed with him, at about 11:15 P.M. (R. 19).

They engaged in casual conversation in the accused's room from 11:15 P.M. until 12:30 A.M., during which they discussed the loss of their money, hoping the accused would volunteer some information. He said nothing, but appeared to them to be nervous (R. 19). At about 12:30 the accused's roommates went to the latrine, and the accused was alone in his room with Lieutenants Hearn and Higginbotham. Lieutenant Higginbotham told the accused that they felt he had taken their money (R. 7, 19). Lieutenant Hearn told the accused that he would give him 45 seconds to produce the money (R. 19). The accused hesitated a

moment, then arose, walked over to his B-4 bag, which was packed preparatory to his leaving the next day, unzipped the bag, removed his 201 file from it and took a small white envelope from his 201 file (R. 7, 19). The accused opened the envelope and took from it four $20.00 bills and eleven $10.00 bills (R. 7). Lieutenant Higginbotham recalled that a portion of his money had been in $20.00 bills, and Lieutenant Hearn remembered that he had had a number of $10.00 bills and one 20 (R. 19).

Upon counting the money they told the accused that they also had some $5.00 and $1.00 bills. The accused took his own wallet out of his pocket and extracted from it a number of $5.00 and $1.00 bills. All of the money was placed on the table. About that time one of the accused's roommates came in and was dumfounded to discover what was happening; when he asked the accused whether he had taken the money, the accused replied, "Yes" (R. 19). Lieutenants Hearn and Higginbotham told the accused to get dressed, and, after he was dressed, he led them to the latrine in Ground School F, where he said he had left Lieutenant Hearn's wallet. They searched unsuccessfully for it (R. 19). (Another officer testified to having found Lieutenant Hearn's wallet in the latrine at Ground School Building F at about 8:00 P.M. on the night of 7 February. The wallet was subsequently returned to Lieutenant Hearn (R. 17, Pros. Exh. 2).)

Lieutenants Hearn and Higginbotham then took the accused to the office used by the Officer of the Day, who, after talking to the Assistant Provost Marshal over the telephone and warning the accused of his rights under the 24th Article of War, took a statement from him in which he admitted that he had stolen the money, having taken Lieutenant Hearn's wallet containing $138.00 and $75.00 from Lieutenant Higginbotham's wallet (R. 23, Pros. Exh. 1). The money produced by the accused, which had been kept together in a pool, was then divided, $138.00 of it being given to Lieutenant Hearn and $75.00 to Higginbotham, there remaining about $38.00, which belonged to the accused (R. 20).

At about 9:00 A.M. the next morning, the accused was brought to the office of the Assistant Provost Marshal, who took another voluntary statement from him (R. 26). The accused was "very nervous and remorseful and very despondent — was very sorry what had happened the night before" (R. 28). In this statement, which was given under oath, the accused told in detail how he had entered the room occupied by Lieutenants Hearn and Higginbotham, intending to play the radio which they had. Upon entering the room, he noticed the wallet on the bed. He took the wallet without looking inside of it and then took another wallet out of the back pocket of Lieutenant Higginbotham's trousers and removed all the money in the wallet. He said that he left immediately and went to the latrine in Ground School Building F, where he took the money out of Lieutenant Hearn's wallet, leaving the wallet there. He then returned to his own room, where he placed all of the $10.00 and $20.00 bills in an envelope, which he put in his 201 file which was in his B-4 bag. He said that he regretted having taken the money almost immediately and intended to return it as soon as he could without detection (Pros. Exh. 3).

b. For the Defense:

First Lieutenant Luther T. Wootan testified that he had known the accused for over two years, having gone through training with him at Santa Ana and Victorville, California, and having served with him overseas (R. 30). He said that the accused's reputation had always been good. (R. 30) First Lieutenant John J. McSweeney also testified that he had known the accused during training and had served with him overseas. He said that the accused bore a very good reputation among the officers who came in contact with him; that he never drank or smoked, and that he was a "clean-cut fellow" (R. 32).

The accused, after having his rights as a witness explained to him, testified under oath in his own behalf (R. 32). He said that he was 22 years old, having entered the Army at 19, and having begun cadet training on 21 September 1942 (R. 33). He graduated as a bombardier from Victorville Army Air Field in 1943, and after the usual operational training, went overseas in November, 1943, where he flew 19 combat missions in the European Theater as a bombardier in B-17s (R. 33). He was not wounded, but on a number of occasions the plane in which he flew was badly shot up. On one occasion the plane landed in the English Channel, and on his last mission his plane was compelled to land in Sweden, where he was interned for six months. While in Sweden, he was athletic director of the camp where he was situated (R. 33).

After being released, he was sent home, where, after a leave, he went to Atlantic City. He was then sent to a hospital for two weeks, and, after another short leave, was transferred to Midland Army Air Field, where he was at the time he received his call to begin pilot training. On the night that this incident occurred he was all packed and processed, ready to leave for San Antonio Aviation Cadet Center (R. 33).

As in his voluntary statement made to the Assistant Provost Marshal, he said that he had entered the room of Lieutenants Hearn and Higginbotham for the purpose of playing the radio. He said that he saw the wallet and in "a minute of weakness" took it. He said that he had never done anything like that before and did not know why he did it on this occasion. He said he was scared immediately and wanted to go back to the room and return the wallet and money, but about that time someone came in and he did not dare to go back. He thought that if he hid the money, he might have an opportunity to return it later, and such was his intention (R. 33). He said that immediately upon being accused by Lieutenant Higginbotham, he admitted having the money and handed it over (R. 34).

After the incident, he said that he was unable to eat or sleep, and when he was finally taken to the hospital, he had not eaten for five or six days (R. 34). He had received the Air Medal with two clusters and the European Theater of Operations ribbon with one star (R. 34). He said he had no need for this money and insisted that he intended to return it. He said that he had been connected with the supervision of Boy Scouts in civilian life (R. 35).

4. The evidence for the prosecution, the testimony and admissions of the accused, together with his plea of guilty, conclusively establish that the accused did at the time and place alleged in the Specification of the Charge take, steal, and carry away about $138, property of Lieutenant Joseph G. Hearn, and about $75, property of Lieutenant Herbert Higginbotham, Jr.

Larceny is the taking and carrying away, by trespass, of personal property which the trespasser knows to belong to another, with intent to deprive such owner permanently of his property (MCM, 1928, par. 149g. page 171).

Once a larceny is committed, a return or an offer to return the property is no defense to a charge of larceny.

The record clearly presents a case of larceny committed by one in the military service of the United States, punishable under the express terms of the 93rd Article of War "as a court-martial may direct."

5. War Department records and papers accompanying the record of trial show the accused to be 22 8/12 years of age, single, and a high school graduate. Upon graduation from school he entered the Army as an Aviation Cadet. Upon completion of his training as a bombardier he was on 19 June 1943 commissioned 2nd Lieutenant. He served overseas as a bombardier in B-17s from 27 November 1943 until 11 April 1944, flying 19 missions. On one mission his aircraft was forced to "ditch" in the English Channel. On 12 April 1944 his plane was forced down in Sweden where he was interned until October 1944. He was returned to the United States. On 27 April 1944 he was promoted to 1st Lieutenant. He was awarded the Air Medal and two Oak-Leaf Clusters.

6. The court was legally constituted and had jurisdiction over the accused and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 93rd Article of War.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

SPJGK - CM 278598 1st Ind.

JUN 11 1945

Hq ASF, JAGO, Washington 25, D. C.

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant John F. T. White (O-748119), Air Corps.

2. Upon trial by general court-martial accused pleaded guilty to and was found guilty of larceny in violation of Article of War 93. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. I concur in that opinion.

While two fellow officers were absent from their quarters taking a shower bath the accused entered their quarters and stole their wallets containing respectively $138.00 and $75.00. When accused of the theft a few hours later he confessed and returned the money. War Department records and papers accompanying the record of trial disclose that the accused served overseas as a bombardier from 27 November 1943 until 11 April 1944, and that he participated in 19 flying missions. On one mission his aircraft had a forced landing in the English Channel. On 12 April 1944, his plane was forced down in Sweden where he was interned until October 1944. He has been awarded the Air Medal and two Oak Leaf Clusters. While accused's conduct was inexcusable, in view of his impressive combat record, I recommend that the sentence be confirmed but that the forfeitures be remitted and that the execution of the sentence as thus modified be suspended during good behavior.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

Myron C. Cramer

2 Incls
1. Record of trial
2. Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but forfeitures remitted. As modified suspended during good behavior). G.C.M.O. 255, 19 June 1945).

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TITLE

DATE	BORROWER'S NAME	EXT.